

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

CASE NO. 22,685

FILED MAR 27 1969

Na... J. Paulson
CLERK

H & B COMMUNICATIONS CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

PRESCOTT TV BOOSTER CLUB, INC.,
Intervenor,

110
21-22

ON APPEAL FROM A MEMORANDUM
OPINION AND ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION

Of Counsel

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March, 1969

(i)

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RECEIVED

JAN 22 1968

F. C. C.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

BROADCAST FACILITIES
DIVISION

JAN 24 1968

In re the Application of)
)
PRESCOTT T. V. BOOSTER CLUB, INC.)
Prescott, Arizona)
)
For Construction Permit for a new VHF)
Television Translator Station to Operate)
on Output Channel 2, Prescott, Arizona)

File No. BPTTV 3306

PETITION TO DENY OR
DESIGNATE FOR HEARING

1. On December 22, 1967, the Commission accepted for filing the above-captioned application of Prescott T. V. Booster Club, Inc. (Booster), Prescott, Arizona, for a construction permit for a new VHF television translator station to operate on output Channel 2 in Prescott, Arizona. Pursuant to Section 309 (d) of the Communications Act of 1934, as amended, and Section 1.580 (i) of the Commission's Rules and Regulations, H & B Communications Corporation (H&B), owner and operator of a CATV system serving Prescott, Arizona, requests that the application be denied or designated for hearing in order to determine whether the public interest, convenience and necessity would be served by the grant thereof.

2. H & B is a party in interest because its Prescott CATV system and the Booster translator will compete with each other for viewers, resulting in economic competition between H & B and ^{1/}Booster. Moreover, as set forth below, grant of the above-captioned application will cause direct and immediate injury to H & B by affecting television reception by CATV subscribers on cable Channel 2 in Prescott and by causing adjacent channel interference to off-the-air reception by the Prescott CATV system of Station KTVK, Channel 3, Phoenix, Arizona. H & B therefore has standing to file this Petition. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); Whitesburg Television Translator, Inc., FCC 68-27 (released January 11, 1968).

3. H & B operates a five channel CATV system in Prescott which carries the signals of five television stations licensed to Phoenix, Arizona. Booster is presently the licensee of translator stations KO4AI.

^{1/} H & B is relying on economic competition with Booster only for the purpose of establishing that it has standing to file this Petition. H & B objects to the grant of the Booster application because of the technical problems set forth below that will be caused to the operation of its CATV system, and it would have no objection to Booth's application if it were amended to specify operation in the UHF band.

KO6AE, KO7AP, and K13FY. The television signals carried and the channels on which they are carried by H & B and Booster are as follows:

<u>Station</u>	<u>Translator Output Channel</u>	<u>Cable Channel</u>
KTAR-TV(NBC), Channel 12	Channel 6	2
KTVK-TV(ABC), Channel 3	Channel 7	3
KOOL-TV(CBS), Channel 10	Channel 4	4
KPHO-TV(Indep.), Channel 5	Channel 13	5
KAET-TV(Ed.), Channel 8	(Application for Channel 2)	6

4. As set forth in the attached Affidavit of Robert L. Beaman, Vice President - Engineering of H & B, Booster's present operations adversely affects the operation of H & B's CATV system in two ways:

- (a) First, the signals of Booster's translators on output Channels 4 and 6 radiate directly into the tuners of individual receivers of H & B's subscribers in Prescott, causing interference to television reception of programs carried by cable on Channels 4 and 6. H&B has attempted to alleviate this problem by installing on individual receivers transformers specifically designed to alleviate strong local interference. Nevertheless, interference from this source remains a significant problem in approximately 40% of the CATV homes in Prescott.

(b) Second, operation of Booster's translators on output Channels 4, 6 and 7 causes adjacent channel interference to H & B's off-the-air reception of Phoenix stations KTVK-TV (Channel 3), KPHO-TV (Channel 5) and KAET-TV (Channel 8). H & B has taken steps to alleviate the adjacent channel interference. Adjacent channel traps are installed directly onto H&B's off-the-air antennas for Channels 3, 5 and 8, and the signals are further processed by Jerrold Channel Commanders or a Conrac demodulator, both of which have good adjacent channel traps, before being distributed to subscribers. Nevertheless, adjacent channel interference from the Booster translators affect off-the-air reception on an average of two days per month, and during the summer of 1967, serious adjacent channel interference was caused to reception of Station KTVK-TV (Channel 3) for 60 continuous days. Moreover, even when use of the traps is effective in reducing or eliminating adjacent channel interference, use of the traps causes degradation to the signals received off the air.

Because interference from radiation of the signals of Booster's translators into the receivers of H & B's subscribers causes interference to reception on cable channels 4 and 6, and because adjacent channel interference is caused to the reception of the signals carried by H & B on cable channels 3 (KTVK-TV), 5 (KPHO-TV) and 6 (KAET-TV), the only cable channel not presently affected by the operation of Booster's existing translators is cable Channel 2.

5. Booster is now applying for a new translator to operate on output Channel 2. Based on H & B's experience with Booster's presently authorized translators, it is clear that operation of a translator on output Channel 2 will cause significant problems to reception by CATV subscribers on cable Channel 2 as a result of radiation of the Channel 2 translator's signal into the receivers of CATV subscribers. Moreover, operation of a translator on output Channel 2 will increase the amount of adjacent channel interference to off-the-air reception of Station KTVK-TV (Channel 3). Reception of the signal of KTVK-TV is already subject to adjacent channel interference from Booster's translator operating on output Channel 4, and during the summer of 1967, there was adjacent channel interference to reception of KTVK-TV for a period of 60 continuous days. Such adjacent channel interference to off-the-air reception of KTVK-TV can only increase from the operation of a translator on output

Channel 2. Thus, grant of Booster's application for a translator operating on output Channel 2 will cause a serious reception problem for CATV subscribers on the only cable channel that does not presently have reception difficulties and additional adjacent channel interference to off-the-air reception of KTVK-TV, which has already been subject to adjacent channel interference for a period as long as 60 days as a result of the operation of Booster's translator on output Channel 4.

6. The Commission has recognized that elimination of interference to CATV reception from radiation of translator signals into the sets of CATV subscribers is desirable. Tri-State Television Translators, Inc., 11 RR 2d 4 (1967). Moreover, Section 74.703 (b) of the Commission's Rules prohibits adjacent channel interference to off-the-air television reception. While the Commission, in Whitesburg Television Translator, Inc., FCC 68-27 (released January 11, 1968), recently granted a translator application despite a claim by a CATV system that adjacent channel interference to its off-the-air reception would result, the facts were considerably different from those in this case. In Whitesburg, the translator was only the second translator serving the area, the programming of another affiliate of the same network as the station whose signal was subject to interference was

available to the CATV system if adjacent channel interference occurred, the translator provided only the second full network service available off-the-air in the area, and no showing was made that shielding and filtering techniques would not be effective in eliminating adjacent channel interference. Here, Booster already operates four translators providing the residents of Prescott and its surrounding area with the service of all three networks and with the signal of an independent television station, no other ABC affiliate's signal is available to H & B for carriage when the signal of KTVK-TV receives adjacent channel interference, and H & B's experience with adjacent channel interference from Booster's existing translators demonstrates that adjacent channel interference cannot be eliminated.

7. The grant of the above-captioned application will have a seriously adverse effect on the service provided by H & B's Prescott CATV system. Since Booster already provides four channels of television service to those residents of Prescott and its surrounding area who do not choose to become CATV subscribers, there is no pressing need for an additional VHF translator in Prescott, particularly when UHF channels are available for translator use. Moreover, the Commission now exercises jurisdiction over CATV systems and considers them, as well as translators, to be auxiliary broadcast services. If

grant of an authorization in one auxiliary broadcast service will cause a substantial impairment of the service provided by a facility in a second auxiliary broadcast service, the Commission must as a minimum matter consider the effects of its action on each service, as well as the resulting gains and losses of service to the public. Here, Booster already provides four channels of off-the-air television service - three network stations and one independent station - and it can provide the fifth service it desires on a UHF channel. Its present operation already impairs the service offered by the Prescott CATV system, and the grant of its application for a translator on Channel 2 will further seriously impair the service offered by the Prescott CATV system. In these circumstances, Booster's application for a translator operating on output Channel 2 should either be denied or designated for hearing in order to determine whether the grant of the application would serve the public interest, convenience and necessity.

Respectfully submitted,

/s/ Harry M. Plotkin
Harry M. Plotkin

/s/ George H. Shapiro
George H. Shapiro

Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N. W.
Washington, D. C. 20006

Date: January 22, 1968

Counsel for H & B Communications Corporation

AFFIDAVIT

Robert L. Beaman, being first duly sworn, hereby deposes and says:

He is Vice President-Engineering of H & B Communications Corporation (H & B).

H & B owns and operates a five channel CATV system in Prescott, Arizona. Television service is also provided to Prescott by translator stations KO4AI, KO6AE, KO7AP, and K13FY, all licensed to Prescott TV Booster Club. Both the CATV system and the translators make available to residents of Prescott the signals of Phoenix, Arizona television stations. Prescott TV Booster Club has now filed an application for a new VHF translator to operate on output Channel 2 in Prescott.

The present operation of the four translators licensed to Prescott TV Booster Club causes severe technical problems to the operation of the Prescott CATV system, and based upon the existing technical difficulties and the additional difficulties that will occur if the pending application for a translator on Channel 2 is granted, H & B urges that the application for the Channel 2 translator be denied. H & B would, however, have no objection to the grant of an additional UHF translator to Prescott TV Booster Club.

The Phoenix television signals are made available to residents of Prescott by means of the translators and the CATV system as follows:

<u>Television Station</u>	<u>Translator Output Channel</u>	<u>Cable Channel</u>
KTAR-TV, Channel 12	Channel 6	Channel 2
KTVK-TV, Channel 3	" 7	" 3
KOOL-TV, Channel 10	" 4	" 4
KPHO-TV, Channel 5	" 13	" 5
KAET-TV, Channel 8	" 2(Application)	" 6 (Weather scan fills in on this channel when KAET is off the air.)

As set forth above, the translators rebroadcasting on output Channels 4 and 6 utilize two of the channels on which the CATV system distributes signals by cable to its subscribers. On both of these channels, the translator signals radiate directly into the tuners of individual receivers in Prescott, causing interference with reception of the cable signals. Viewers see fine diagonal lines on their screens, and occasionally a vertical bar to the right of the center of the picture. The intensity of lines and the bar vary in different areas of Prescott, depending upon the intensity of the signal of the translator. However, the radiation into the tuners causes a significant reception problem in approximately 50% of the CATV homes in Prescott.

H & B has attempted to eliminate this problem by installing Vokoa 448 Transformers to the receivers when it makes house taps. This transformer is specifically designed to alleviate strong local interference. The transformer reduces the interference in approximately 50% of the instances in which it is used. It is not necessary to use the transformer in approximately one-third of the CATV homes in Prescott because they are already shielded from the translator signals by natural obstacles. However, even with the use of the transformer, interference of the kind described above is a significant problem in approximately 40% of the CATV homes in Prescott.

The Prescott translators also cause adjacent channel interference to the off-the-air reception of the Phoenix signals carried on three of the cable channels. As set forth above, cable Channel 3 carries the signal of off-the-air Channel 3 from Phoenix, while a translator operates on output Channel 4. Cable Channel 5 carries the signal of off-the-air Channel 5 from Phoenix, while a translator operates on output Channel 6. Cable Channel 6 carries the signal of off-the-air Channel 8, while a translator operates on output Channel 7. The extent to which off-the-air reception by the CATV system of off-the-air Channels 3, 5 and 8 from Phoenix is affected by adjacent channel interference varies with atmospheric conditions and other factors affecting the propagation of both the Phoenix television signals and the signals of Prescott translators. When adjacent channel interference occurs, it shows up on television screens as a herring bone effect or a beaded horizontal line moving up

and down, accompanied by a vertical bar moving back and forth. The adjacent channel interference problem has been most severe on Channel 3, where for a period during the summer of 1967, serious interference was caused for 60 continuous days. On the average, adjacent channel interference affects off-the-air reception at the head end of the CATV system on an average of approximately two days per month.

H & B has taken steps to eliminate the problems caused by adjacent channel interference. For example, on four of its five cable channels, H & B uses Jerrold Channel Commanders, which have good adjacent channel sound and picture traps, to eliminate adjacent channel interference. On the fifth channel, it uses a Conrac demodulator, which also has good adjacent channel traps. Adjacent channel traps are also installed directly on to the three off-the-air antennas for the channels subject to adjacent channel interference, but these traps have had little effect in eliminating adjacent channel interference to off-the-air.

Channel 3. When tuned for maximum effectiveness, the Channel 4 trap attached to Channel 3 off-the-air antenna causes color degradation of the signal received. The trap attached to the antenna for off-the-air Channel 8 has been somewhat more effective in eliminating adjacent channel interference from translator Channel 7, but the result has been degradation of the picture quality on off-the-air Channel 8 when it is carried on the CATV system.

In order not to effect the choice presently available to the residents of Prescott between off-the-air television service from the translators and cable service from H & B, H & B has not thus far sought to require the Prescott translators to show cause why they should not be ordered to change their output channels to UHF channels. However, authorization of yet another VHF translator, on output Channel 2, will cause interference from radiation into receivers on the one channel on the CATV system on which reception has not been subject to difficulties from the operation of the existing Prescott translators. Moreover, operation on output Channel 2 can be expected, in view of the adjacent channel interference difficulties presently faced by the CATV system, to cause increased adjacent channel interference to the off-the-air reception from off-the-air Channel 3. These difficulties will cause further impairment of the service presently offered by the Prescott CATV system and a loss of subscribers to the CATV system.

The statements set forth above are based upon my own personal knowledge of the operation of the Prescott CATV system and the Prescott translators, and to the best of my own knowledge and belief, they are true and correct.

Robert L. Beaman
Robert L. Beaman

Subscribed and sworn to before me this 15th day of January 1968

Glenn Buller
Notary Public

CERTIFICATE OF SERVICE

I, Nicole Provan, do hereby certify that on this 22nd day of January, 1968, I have mailed by first class United States mail, postage prepaid, copies of the foregoing "Petition To Deny or Designate For Hearing" to the following:

Prescott T. V. Booster Club, Inc.
c/o Mr. Hugh H. Kingsbury
P.O. Box 1990
Prescott, Arizona

*Air Mail

Nicole Provan

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re the Application of

PRESCOTT T. V. BOOSTER CLUB, INC.
Prescott, Arizona

For Construction Permit for a new VHF
Television Translator Station to Operate
on Output Channel 2, Prescott, Arizona

File No. BPTTV 3308

REPLY TO PETITION
TO DENY OR DESIGNATE
FOR HEARING

COMES NOW PRESCOTT T. V. BOOSTER CLUB, INC., an Arizona corporation, applicant for a construction permit for a new VHF television translator station to operate on output Channel 2 in Prescott, Arizona, and pursuant to 47 U.S.C. Sec. 39 (d) (1), hereby replies to the Petition of H & B Communications Corporation heretofore filed in the above captioned matter.

1. On December 22, 1967, the Commission accepted for filing an application of PRESCOTT T. V. BOOSTER CLUB, INC., hereinafter referred to as "Booster", for a construction permit for a new VHF television translator station to operate on output Channel 2 in Prescott, Arizona. On January 22, 1968, a Petition to Deny this application, or for designation of this application for hearing was filed by H & B Communications Corporation, hereinafter referred to as "H & B", owner and operator of a CATV system serving Prescott, Arizona.

2. Booster is presently the licensee of translator stations K06AT, K06AE, K07AP and K13FY. H & B operates a five-channel CATV system

in Prescott, which carries the signals of five television stations licensed to Phoenix, Arizona, these being the same channels which Booster carries under its license, except Channel 8, KAET-TV, application for which is presently pending before this Commission.

3. Booster is a nonprofit corporation authorized and existing under the laws of the State of Arizona. Funds to operate its existing translator stations and the proposed station translating Channel 8 are obtained from voluntary public subscription. The officers and directors of this corporation serve without compensation. No income accrues to the members of the corporation, and all funds derived from the voluntary public subscription are used exclusively for current operating expenses and purchase of equipment.^{1/}

4. H & B is a profit corporation deriving its profits by selling a cable service at a monthly rate, after an initial installation charge.

5. The area served by Booster is reflected in Exhibit "A" attached hereto, this area having an approximate population of 22,000. H & B is presently serving a portion of the City of Prescott, as reflected in Exhibit "A" attached hereto, this area having an approximate population of 14,000.

6. Without waiving any right to raise the issue of H & B's Petition before the Commission, Booster will discuss the merits of this Petition. H & B's Petition is based primarily on technical problems dealing with the receiving and transmitting of television signals, these being:

^{1/} These matters are brought to the Commission's attention here to point out the fact that no economic competition exists between Booster and H & B; and that the areas served by these two systems are substantially different. In certain areas presently served by Booster, no service of any nature is provided by H & B. It is therefore respectfully submitted that H & B is not an interested party and has no standing before the Commission in this matter.

- (a) Radiation of Booster's signals directly into the tuners of individual receivers of H & B's subscribers in Prescott, Arizona; and
- (b) Operation of Booster's translators on output Channels 4, 6 and 7 causing adjacent channel interference with H & B's off-the-air reception of Channels 3, 5 and 8 from Phoenix, Arizona.

7. Turning to the first problem mentioned above, it is apparent from the Affidavit of Wiley Campbell, Booster Chief Engineer, attached hereto, that the output on all four of Booster's channels does not exceed the 1.0 Watt output authorized by the various licenses held by Booster and issued by the Federal Communications Commission. The receiving and transmitting power and wattage are in conformity with all licensing requirements, and the operation of these translator stations is conducted in strict accordance with Federal Communications Commission rules and regulations. The signals which are transmitted by these stations are in all respects lawful. It therefore appears that the interference of which H & B complains is lawfully in the air, subject to reception by individual receivers in the area over which these signals lawfully pass. H & B's complaint, then, is basically that that corporation can not supply to its subscribers the service for which the subscriber pays, that is, interference-free reception. This, it is submitted, is a technical problem of H & B's service, and not a technical problem of Booster's transmission, these transmissions being lawfully in the air in the manner authorized by this Commission. H & B's home reception problem in this regard can be adequately taken care of by the use of a grounded, shielded wire connected between the individual receiver terminals and the tuner on the individual set.

This, H & B has apparently not seen fit to supply to its subscribers. Its problem, therefore, in regard to radiation directly into its subscribers' tuners, is a problem arising out of its own inadequate service, and not one originating with the Booster's transmission.

8. Turning now to the second problem mentioned above, that is, interference with off-the-air reception from Phoenix, Arizona, a careful inquiry is necessary to arrive at exactly the technical problem complained of by H & B. This becomes immediately apparent when reference is made to Exhibit "B" attached hereto. Exhibit "B" graphically depicts the respective locations of Booster's receiving and transmitting antennas in relation to the point of origin of all signals rebroadcast by both Booster and H & B (Phoenix, Arizona), the direction in which Booster's signal is rebroadcast and the location of H & B's receiving equipment. Although this exhibit is a sketch, reference to it is helpful in arriving at a solution to the problem complained of by H & B, and points up the following facts:

- (a) The television signals transmitted from Phoenix, Arizona arrive at the receiving antennas of both Booster and H & B from a southerly direction;
- (b) The transmission by Booster of its signal is in a northeasterly direction;
- (c) Booster's transmitting antennas are approximately 900 feet in an easterly direction from its receiving antennas, and approximately 2,400 feet West of H & B's receiving antenna, all of these antennas being in an approximate direct line; and
- (d) Booster's receiving antennas are shielded by one hill from its transmitting antennas, and H & B's

receiver is shielded by two hills from Booster's transmitting antennas.

These facts become important when it is realized that, although B Booster's receiving antennas are in closer proximity to its transmitting antennas than is H & B's receiver, Booster has never suffered from interference with off-the-air reception from Phoenix, Arizona. In order to alleviate any possible transmission interference, Booster has installed Viking Absorption Traps on its equipment. H & B has indicated that it has placed Jerrold Channel Commander or a Conrac demodulator on its equipment to attempt a trapping of interfering adjacent channel radiation. All of this trapping equipment used by both Booster and H & B requires precision adjustment to reach maximum efficiency in its respective trapping duties. Booster has adjusted its equipment to such a degree that no adjacent channel interference is experienced.

9. Again, it is apparent that where Booster experiences no adjacent channel interference, by reason of its transmission, the problem is a technical one which has been solved by Booster and apparently has not been solved by H & B.

For the foregoing reasons, it is respectfully submitted that the Petition heretofore filed by H & B should be denied.

Dated this 25th day of May, 1968.

Respectfully submitted,

PRESCOTT T. V. BOOSTER CLUB, INC.

By s/ EINO M. JACOBSON

Eino M. Jacobson

P. O. Box 1031

Prescott, Arizona 86301

Counsel for Prescott T. V. Booster
Club, Inc.

A F F I D A V I T

WILEY CAMPBELL, being first duly sworn upon his oath, deposes and says:

That he is the Chief Engineer of Prescott T. V. Booster Club, Inc., a nonprofit corporation; that he makes this Affidavit for and on behalf of said corporation, he being more familiar with the facts contained herein, and being duly authorized to do so;

That he has personally conducted extensive tests and checks of the transmitting equipment of Prescott T. V. Booster Club, Inc.; that the output on all four of the channels of said corporation does not exceed the 1.0 Watt output authorized for each channel by the licenses issued by the Federal Communications Commission;

That the receiving and transmitting power and wattage of the corporation's equipment is in conformity with all licensing requirements, and the rules and regulations of the Federal Communications Commission;

That the corporation has experienced no adjacent channel interference by reason of the operation of the transmitting equipment of the corporation; and that the corporation has installed Viking Absorption Traps on its equipment in order to correct any possible interference;

That he has prepared Exhibits "A" and "B" attached to the reply of the Prescott T. V. Booster Club, Inc., and personally knows that the area receiving television signals from the corporation's transmitting equipment has an approximate population of 22,000; and that the area receiving television signals from H & B Communications Corporation has

an approximate population of 14,000.

Further, Affiant sayeth not.

s/ WILEY CAMPBELL
Wiley Campbell

SUBSCRIBED AND SWORN to before me, this 4th day of

June, 1968.

(Seal)

s/ PATRICIA C. JACOBSON
Notary Public

My Commission Expires:

May 30, 1971

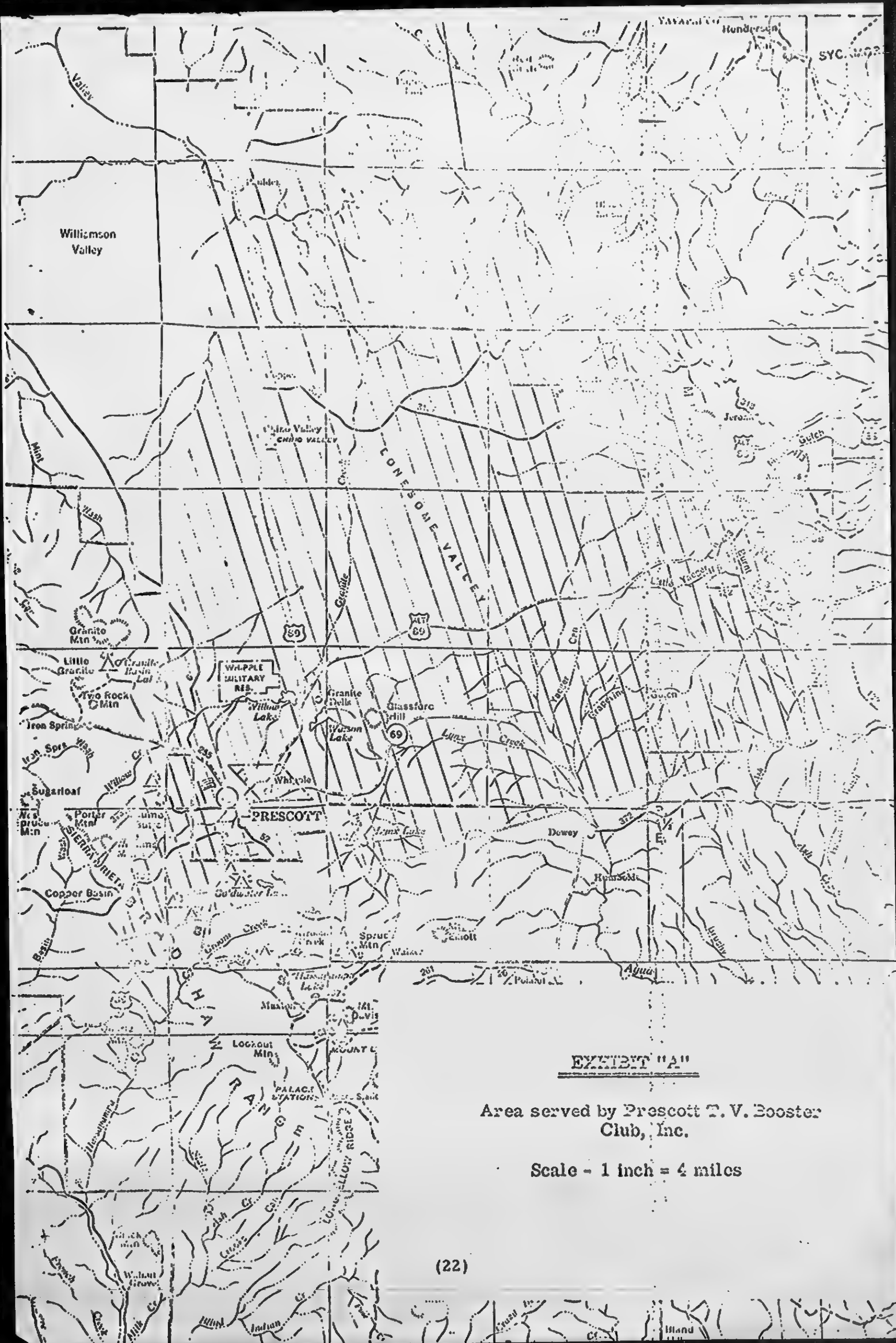
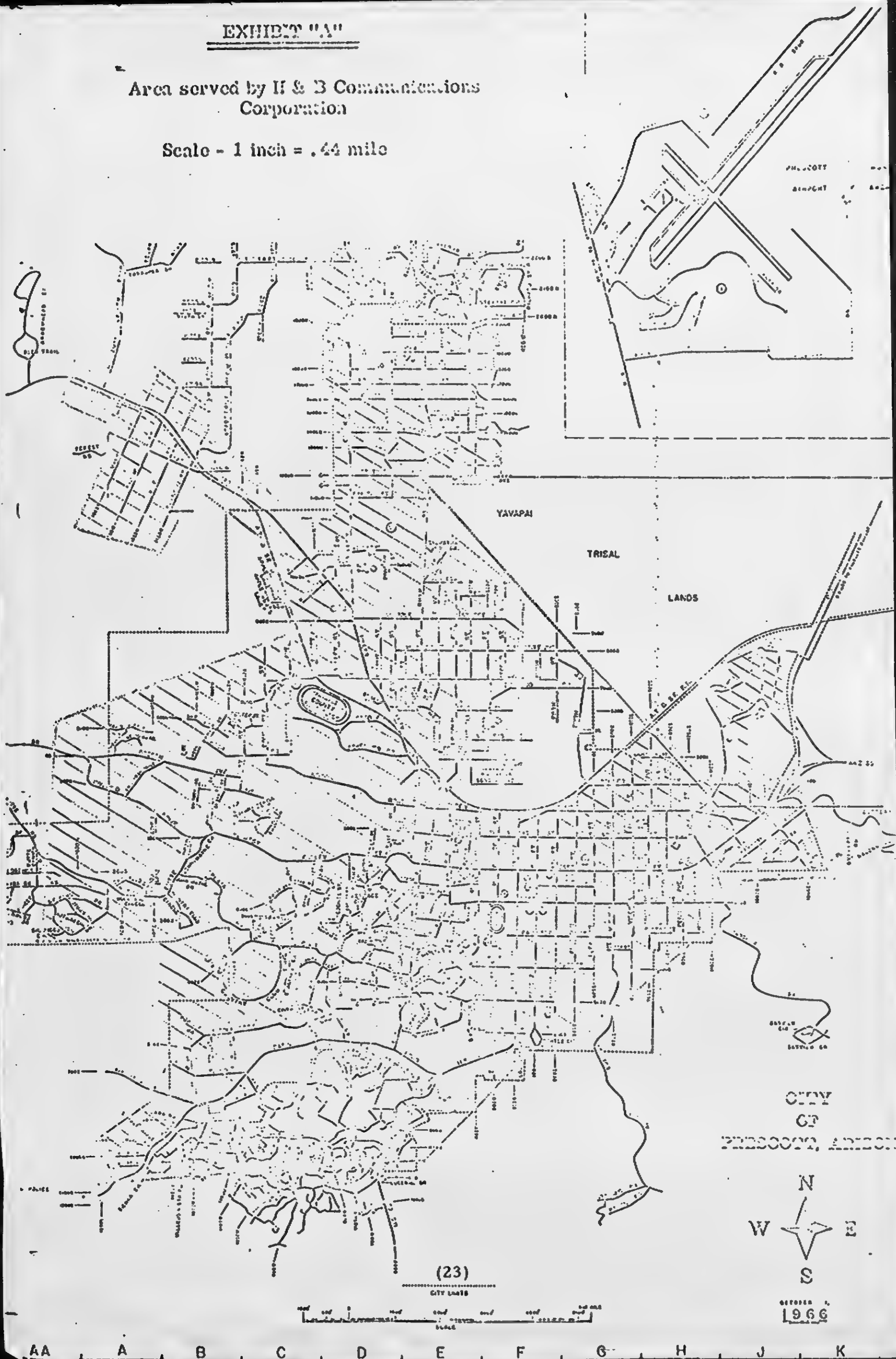


EXHIBIT "A"

Area served by H & B Communications
Corporation

Scale - 1 inch = .44 mile



NORTH

1

PLANNED
CONSTRUCTION
PROJECTS
1960-1961

1500'

HILL

CONSTRUCTION

CONSTRUCTION

CONSTRUCTION

CABLE CAR

RECEIVING

400'

TV CABLE
RECEIVING

TV CABLE
RECEIVING

ON 11/1/60

11/1/60

NOTHING MORE TO BE
DONE AT THIS LOCATION
RECEIVING ANTENNA AND
CABLE CAR
FOR THE CABLE CAR
ANTENNA
FROM CONSTRUCTION

PLANNED

CONSTRUCTION
PROJECTS
1960-1961

JV

RECEIVED
JUL 18 1968
F.C.C.
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re the Application of)

PRESCOTT T.V. BOOSTER CLUB, INC.)
Prescott, Arizona)

File No. BPTTV-3306

For Construction Permit for a new VHF)
Television Translator Station to Operate)
on Output Channel 2, Prescott, Arizona)

REPLY OF H & B COMMUNICATIONS CORPORATION

1. On January 22, 1968, H & B Communications Corporation (H & B), owner and operator of a CATV system in Prescott, Arizona, filed a Petition to Deny or Designate for hearing the above-captioned application of Prescott T. V. Booster Club, Inc. (Booster). Over four months later, Booster filed an opposition^{1/} to H & B's Petition. This is H & B's reply to Booster.

2. Initially, Booster's pleading is procedurally deficient. Pursuant to Section 1.580(j) and 1.45 of the Commission's Rules, its pleading was due

^{1/} Booster's pleading is entitled "Reply to Petition to Deny or Designate for Hearing." The pleading is nevertheless an opposition pleading, and not a reply pleading. There can therefore be no question concerning H & B's right, pursuant to Section 1.580(j) of the Commission's Rules, to file a reply pleading

on February 6, 1968, but was not filed until June 4, 1968, ^{2/} almost four months late. Booster neither sought an extension of time for filing its pleading nor made a showing when it filed of why it was unable to file on time.

3. If the Commission determines that, procedural deficiencies notwithstanding, it should nevertheless consider Booster's pleading on its merits, Booster argues that the facts set forth in H & B's Petition are incorrect in two major respects. ^{3/} First, it alleges that the interference to H & B's subscribers caused by radiation of the signals of two of its existing translators and similar radiation from its proposed translators in the sets of CATV subscribers can be eliminated by the use of a grounded, shielded wire connected between the individual receiver terminals and the tuner on the individual set. In its Petition, H & B set forth the method it utilizes to attempt to eliminate such radiation. ^{4/} As set forth in the

^{2/} It is assumed that copies of Booster's pleading were mailed to the Commission on the same date they were served upon H & B and that, giving Booster the benefit of any doubt, the Commission would consider the filing complete upon mailing of Booster's pleading to the Commission.

^{3/} Booster has challenged H & B's standing to file its Petition. Despite the fact that Booster serves a larger area than H & B, there can be no question of the fact that Booster and H & B compete with each other for viewers in Precott and that H & B accordingly has standing to seek denial of its application.

^{4/} The Commission has itself recognized that radiation of strong local signals in the sets of CATV subscribers causes serious reception difficulties. See Midwest Television, Inc. (KFMB-TV), FCC 68-662 (released June 28, 1968); Tri State Translators, Inc., 11 RR 2d 4 (1967).

attached Affidavit of Robert L. Beaman, H & B's Vice President - Engineering, H & B has in the past attempted to utilize methods that included the use of shielded cable directly into the tuner, as suggested by Booster, in order to attempt to eliminate radiation of Booster's signal in the sets of its subscribers. However, H & B found that those methods were less effective than the method presently utilized and in addition created a serious safety hazard.

4. Second, Booster alleges that it has not suffered adjacent channel interference to its off-the-air reception even though its receiving antennas are in closer proximity to the transmitting antennas than are H & B's receiving antennas. It further alleges that any adjacent channel interference that exists and will be caused by Booster's proposed translators can be eliminated by precision adjustment of trapping equipment. Again, the attached Affidavit of Mr. Beaman sets forth the steps H & B has taken to eliminate adjacent channel interference and the results of Mr. Beaman's investigation of the effectiveness of the specific trap referred to by Booster. As set forth by Mr. Beaman, the manufacturer of the trap utilized by Booster advised that due to the fact that R. F. traps utilize extremely narrow band resonant circuits, they are therefore not recommended for trapping adjacent channel signals because of phase distortion of color signals on the desired channel. It may be that the apparent success Booster alleges that it has

had by utilizing such traps results from an absence of color set owners viewing Booster's signal.

5. Booster's allegations that its signals are legally in the air^{5/} and that it operates in accordance with the Commission's rules are irrelevant to the issues before the Commission. H & B has alleged facts showing that a grant of Booster's application will cause two different kinds of interference on the Prescott CATV system. These allegations are supported by the Affidavit of H & B's Vice President-Engineering, who has personal knowledge of the facts alleged. While some of these allegations have been controverted by Booster, the Affidavit attached to this pleading establishes that the measures Booster asserts will resolve the interference questions are insufficient for that purpose, or at a minimum that the differences between the factual allegations of H & B and Booster cannot be resolved without a hearing. Furthermore, H & B's allegations raise a substantial and material question about whether grant of Booster's application would serve the public interest, convenience and necessity. The translator for which Booster is

^{5/} In view of the provisions of Section 74.703(b) and H & B's showing of existing interference to direct reception of television signals, H & B may have a basis for requiring Booster to suspend operation of those existing translators which cause adjacent channel interference to direct reception of television signals. No such action is requested in this proceeding. H & B is simply attempting to prevent the existing interference situation from becoming worse.

applying would constitute its fifth VHF translator, and grant of its application would further impair a service that is already adversely affected by the operation of Booster's other translators. Booster can provide an additional channel of television service to the residents of its service area by applying for a UHF translator. Operation in the UHF band will not have an adverse effect on the technical operation of the Prescott CATV system, and H & B has already stated that it would not oppose Booster's application if it were amended to specify operation on a UHF channel. In these circumstances, the issue is not whether Booster's existing translator signals are legally in the air, but whether the benefits to the public from the authorization of a fifth VHF translator in Prescott, particularly when UHF operation of the translator is feasible, outweigh the detriment to those residents of Prescott who choose to subscribe to H & B's CATV system and would suffer further impairment of service if Booster's application is granted. H & B therefore urges that Booster's application be denied or designated for hearing.

Respectfully submitted,

/s/ Harry M. Plotkin
Harry M. Plotkin

/s/ George H. Shapiro
George H. Shapiro

Arent, Fox, Kintner, Plotkin & Kahn
1100 Federal Bar Building
Washington, D. C. 20006

Counsel for H & B Communications
Corporation

July 18, 1968

AFFIDAVIT

Robert L. Beaman, being first duly sworn, hereby deposes and says:

He is Vice President Engineering of H & B Communications Corporation (H & B).

He has read the Reply to Petition to Deny or Designate for Hearing, filed on June 6, 1968, by Prescott T.V. Booster Club, Inc. (Booster).

In opposing Booster's application for a new VHF translator on Channel 2 in Prescott, H & B relied primarily on two technical considerations. These were the problem of radiation of a Channel 2 translator's signal into the television receivers of cable subscribers in Prescott and the adjacent channel interference Booster's operation would cause to H & B's off-the-air reception of Station KTVK-TV, Channel 3, Phoenix, Arizona. Because of these problems, both separately and in combination with radiation and adjacent channel problems already encountered by H & B's Prescott CATV system from the operation of Booster's already authorized translators, H & B felt that the authorization of an additional translator on Channel ^{1/}2 would be contrary to the public interest.

^{1/} H & B has indicated that it would not object to Booster's application if it were amended to specify operation on a UHF channel.

On page 3 of its pleading, Booster states that the problem of radiation in the receivers of H & B's subscribers can be adequately taken care of by the use of grounded, shielded wire connected between the individual receiver terminals and the tuner on the individual set. In its original petition, H & B indicated that it attempts to alleviate the radiation problem by installing Vikoa 448 transformers to receivers when it makes house taps and that this transformer is specifically designed to alleviate strong local interference. At present, H & B utilizes shielded cable to make the connection from its distribution plant to the transformers. However, the 300 ohm line from the transformers to the terminals, a line which is not longer than approximately two inches, is normally not shielded. Nor is the twin lead inside the television set running from the set terminals to the tuner normally shielded. As set forth in H & B's petition, the transformer reduces interference in approximately 50% of the instances in which it is used. The only portion of the connection between the cable plant and the television tuner which is not shielded is therefore that portion between the transformer and the tuner.

In the past H & B has attempted to further minimize the radiation problem by connecting shielded twin leads to its transformers. The unshielded twin lead inside a television set was then disconnected and the twin lead was extended from the transformer directly into the

set's tuner. This process, however, creates a safety hazard. If the chassis of an individual set is connected to one side of a 110-volt line and the grounded coaxial cable is directly connected to the set's tuner, it is possible, when the set is plugged in, that the 110 volts of electricity will flow through the chassis itself. In order to prevent such a direct short circuit, H & B has used blocking condensers in series with the shield on the coaxial cable and the center conductor. Although this resolves the shorting problem, even the extremely short leads used on the condensers can allow extraneous pickup of television signals. This would recreate the very condition which the entire process was designed to eliminate, and it can additionally create a shock hazard if anyone should touch the coaxial cable shield near the tuner and the chassis of the set at the same time.

H & B has also in the past attempted to run shielded cable directly from the CATV plant into the individual set tuners without first going through a transformer. This process requires that the individual set tuners be modified to 75 ohm input and connected to the CATV plant's 75 ohm coaxial cable. Such a procedure eliminates all unshielded connections between the CATV plant and the tuner and eliminates the chance that the ferrite cores in the transformers may pick up signal radiation. Again, however, the same safety problem as that encountered when shielded twin lead is installed directly from the transformer to the tuner can result.

While both of these procedures have provided some further elimination of radiation in the television sets, they reduced translator interference to a satisfactory level in well under half of the instances in which either method was attempted, apparently because of direct pick up of the translator signals in the tuners themselves. Because of their limited effectiveness and the serious safety hazard involved, H & B discontinued utilizing these methods in approximately 1965. Moreover, even when H & B was attempting to utilize these methods, it encountered resistance from its subscribers to the modification required in the subscriber's sets.

On pages 4 and 5 of its pleading, Booster indicates that adjacent channel interference should be a limited problem and should be able to be eliminated through precision adjustment of adjacent channel traps. H & B has previously set forth the methods it has utilized to eliminate problems caused by adjacent channel interference. These methods involve the installation of Jerrold Channel Commanders and a Conrac demodulator, all of which contain good adjacent channel traps which operate at intermediate frequencies in the 39 to 45 MHz range. Trapping can be effectively accomplished at these frequencies with less degradation of the desired signal than at the frequencies on which the signals are received. In addition, H & B uses adjacent channel traps that have been installed directly on the three off-the-air antennas utilized. Moreover, the present

height of H & B's receiving antenna has been selected in order to take the maximum advantage of the shielding provided by terrain features shown in Exhibit B to Booster's pleading. Nevertheless, as set forth in H & B's Petition, adjacent channel interference continues to be a problem and can be expected to increase if Booster's application for a channel 2 translator is granted.

With respect to Booster's reference to Viking Absorption Traps installed on its equipment, I discussed the properties of these traps with representatives of Vikoa, Inc. (formerly Viking) while attending the National Cable Television Association Convention in Boston at the end of June, 1968. I was advised by representatives of Vikoa that due to the fact that R. F. traps utilize extremely narrow band resonant circuits, they are not recommended for trapping adjacent channel signals because of phase distortion of color signals on the desired channel. I also checked with representatives of Jerrold concerning its adjacent channel traps and was given the same advice. This advice confirms H & B's experience, set forth in its Petition, concerning the effectiveness of traps to eliminate the effect of adjacent channel interference. To the best of my knowledge, there is no adjacent channel trap that will operate effectively without causing color degradation.

Robert L. Beaman
Robert L. Beaman

Subscribed and sworn to before me this 15th day of July, 1968
ANNE BILLER
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires Jan. 1, 1972

Anne Biller
Notary Public

CERTIFICATE OF SERVICE

I, Christina Ricucci, do hereby certify that I have, this 18th day of July, 1968, sent by United States air mail, postage prepaid, copies of the foregoing "Reply of H & B Communications Corporation" to the following:

Eino M. Jacobson
P. O. Box 1031
Prescott, Arizona 86301
Counsel for Prescott T. V. Booster
Club, Inc.

Christina Ricucci

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20534

September 11, 1968

IN REPLY REFER TO:

8820

AIR MAIL

Prescott T.V. Booster Club, Inc.
P.O. Box 1990
Prescott, Arizona 86301

Gentlemen:

Reference is made to your application (BPTTV-3306) for a construction permit for a new 1-watt VHF television broadcast translator station to serve Prescott, Arizona, by rebroadcasting Station KAET, Channel *8, Phoenix, Arizona, on output Channel 2, and the various pleadings filed in connection therewith.

On the basis of the information presently available to the Commission, it appears that operation by the proposed translator station on any VHF output channel on the lower 5 channels (channels 2 through 6) may cause interference to reception by the subscribers to the CATV system operated by H & B Communications Corporation on their cable as well as to the CATV system's off-the-air pick-up of incoming signals. Although the Commission's Rules do not require that the reception of a CATV system's signals by its subscribers be protected against interference by a broadcast station, elimination of such interference would be desirable. Tri-State Television Translators, Inc., 9 FCC 2d 764, 11 RR 2d 4. A question arises, therefore, as to whether operation of the proposed translator on output Channel 9 or 11 instead of output Channel 2 would not be more in the public interest. While it may be that the problem of interference to the CATV system's pick-up of incoming signals would not be eliminated, interference to reception on the cable could be eliminated.

Accordingly, you are requested to file with the Commission, within thirty (30) days of the date of this letter, a statement, supported by an engineering showing, setting forth the effect of operation on output Channel 9 or output Channel 11. Your statement must indicate that a copy has been served on the petitioner and the petitioner will be afforded an opportunity to file a reply thereto. The statement and supporting documents are to be filed in triplicate

Sincerely yours,

cc:
Mr. Eino M. Jacobson
Arent, Fox, Kintner, Plotkin
& Kahn

Martin I. Levy, Chief
Broadcast Facilities Division
Broadcast Bureau

EINO M. JACOBSON
ATTORNEY-AT-LAW
133 SOUTH CORTEX
PRESCOTT, ARIZONA 86301

TV FACILITIES
(LEGAL)

OCT 14 1968

October 9, 1968



Federal Communications Commission
Washington, D. C.

Attention: Martin I. Levy, Chief
Broadcast Facilities Division, Broadcast Bureau

Re: File No. 8820
BPTTV 3306

Gentlemen:

Reference is made to your letter of September 11, 1968, concerning a request to file with your office a statement setting forth the effect of operating on output channels No. 9 or 11 rather than requested output Channel No. 2 in connection with the above-captioned application. Attached hereto is the Affidavit of Wiley Campbell, Prescott TV Booster Club engineer in support of the following statement:

As indicated by Mr. Campbell's Affidavit, two problems are present in converting incoming Channel 8 to outgoing Channels 9 or 11. These basically can be summarized as (1), technical impossibility as to output Channel 9 and (2), difficulty in removing adjacent channel interference as to Channel 11.

Both H & B Communications Corporation and Prescott TV Booster Club would be using adjacent Channels 8 and 10 for off the air pickup. The conversion of incoming Channel 8 to output Channel 9 is a conversion not recommended by equipment manufacturers. The same situation exists with regard to output Channel 11, as both H & B Communications Corporation and Prescott TV Booster have off the air pickup on Channels 10 and 12. The conversion to Channel 11 is technically possible but not the most desirable, as elimination of adjacent Channel interference is more difficult, to do to the small percentage of difference in frequency.

The problem of adjacent Channel interference on low adjacent channels is not as severe as evidenced by Prescott TV Booster experiencing no

1302

October 9, 1968

great difficulty in eliminating interference on low adjacent channels to their own pickup of off the air channels. In this case, the pickup antenna of Prescott TV Booster is much nearer to its transmitting antenna than H & B Communication Corporation's pickup antenna.

We also submit that the major problem of interference can be solved with installation of cables and dropped lines by H & B Communications Corporation, which are properly shielded and matched. Some of the distribution lines used by H & B Communications Corporation are still parallel open wire balanced lines. Tap offs are pressure type unmatched taps on coaxial lines. These practices result not only in interference to cable pictures but also in severe radiation interference to antenna reception. It is our understanding that H & B Communications Corporation is going to rebuild their system completely which should alleviate their line pickup and radiation problems.

In view of the above consideration, it would seem more desirable to H & B Communications Corporation and the citizens served by the Prescott TV Booster to allow the application as submitted for rebroadcast on Channel 2.

We are forwarding a copy of the foregoing statement and attached Affidavit on the Petitioner through their attorneys Arent, Fox, Kintner, Plotkin and Kahn.

Cordially yours,

Eino M. Jacobson

Eino M. Jacobson, *M.E.S.*
Attorney for Prescott TV Booster Club,
Applicant

EMJ:meg

cc: Arent, Fox, Kintner, Plotkin & Kahn

STATE OF ARIZONA)
)
County of Yavapai) ss

WILEY CAMPBELL, being first duly sworn on oath, deposes and says:
That he is the Engineer for PRESCOTT TV BOOSTER CLUB, and as
such, familiar with all the matters hereinafter set forth; that H & B
COMMUNICATIONS CORPORATION is presently using off the air pickup on
Channels Eight (8) and Ten (10); that if the application on file herein of
PRESCOTT TV BOOSTER CLUB is granted, they would also be using
off the air pickup on Channels Eight (8) and Ten (10); that adjacent channel
conversions from Channel Eight (8) to Channel Nine (9) are not recommended
by equipment manufacturers.

That at the present time, H & B COMMUNICATIONS CORPORATION and
PRESCOTT TV BOOSTER CLUB are using off the air pickup on Channels Ten
(10) and Twelve (12); that conversion from Channel Eight (8) to Channel
Eleven (11) is possible but not the most desirable as elimination of Channel
interference is more difficult to do to the smaller percentage difference in
frequency.

That at the present time PRESCOTT TV BOOSTER CLUB is experiencing
no difficulty in eliminating interference on low adjacent channels to its own
pickup of off the air channels; that the pickup point of PRESCOTT TV BOOSTER
CLUB is much nearer to its transmitting antenna than H & B COMMUNICATIONS
CORPORATION'S pickup antenna.

That H & B COMMUNICATIONS CORPORATION'S major problem of
interference can be solved with installation of cables and drop lines which are
properly shielded and matched; that at the present time some of the

distribution lines used by H & B COMMUNICATIONS CORPORATION are still parallel open wire balanced lines and tap offs are pressure type unmatched taps on coaxial lines; that these practices result not only in interference to cable pictures but also in severe radiation interference to antenna reception.

That at the present time, the interests of H & B COMMUNICATIONS CORPORATION and the citizens of the area served by the PRESCOTT TV BOOSTER CLUB would best be served by converting incoming Channel Eight (8) to output Channel Two (2).

Further, Affiant saith not.

Wiley A. Campbell
Wiley Campbell

SUBSCRIBED and sworn to before me this 9th day of October,

1968.

Mae Bitson
Notary Public

My Commission Expires:

Sept. 5, 1972

HENRY J. FOX
EARL W. KINTNER
HARRY M. PLOTKIN
DAVID H. PLOTKIN
SAMUEL L. PLOTKIN
ARTHUR L. CONTENT
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202 347-8500

NOV 7 - 1968

F. C. C.
OFFICE OF THE SECRETARY

Ben F. Waple, Secretary
Federal Communications Commission
Washington, D. C. 20554

In re: 8820
BPTTV 3306

Dear Mr. Waple:

By letter dated September 11, 1968, the Commission requested that Prescott T. V. Booster Club, Inc. (Booster), applicant for a new VHF translator on output Channel 2 in Prescott, Arizona (File No. BPTTV 3306), file with the Commission a statement, supported by an engineering showing, setting forth the effect of operation on output Channel 9 or output Channel 11. The Commission's letter indicated that H & B Communications Corporation (H & B), which has filed a Petition to Deny the above-referenced application, would be afforded an opportunity to reply to Booster's statement. Booster mailed its statement to the Commission on October 9, 1968. This is H & B's reply to Booster.

Attached hereto is an Affidavit of Robert L. Beaman, H & B's Vice President-Engineering, setting forth in detail H & B's reply to Booster's statement. As set forth by Mr. Beaman, Booster rejects the use of output Channels 9 and 11 for one of the two reasons H & B has opposed Booster's application on output Channel 2 - adjacent channel interference to off-the-air reception. While Booster concedes that such interference would exist if it operated on Channel 9 or 11, Booster does not anticipate that operation on Channel 2 will cause adjacent channel interference to its off-the-air reception of Channel 3 from Phoenix because such interference is easier to eliminate when there is a large percentage difference in frequency between the input and output channels on a translator. However, as set forth by Mr. Beaman,

H & B converts the signal of Channel 3, which is already subject to adjacent channel interference from Booster's Channel 4 translator, to intermediate frequencies in the 39-45 MHz range and attempts to trap out adjacent channel signals at those frequencies. Although this conversion results in a greater percentage difference in frequencies than that obtained by Booster, adjacent channel interference has not been eliminated. H & B therefore continues to believe that adjacent channel interference to off-the-air reception of Channel 3 will increase from that already encountered from the operation of Booster's Channel 4 translator if Booster's application for a translator on output Channel 2 is granted.

Mr. Campbell also deals again with the problem of interference to television reception on cable Channel 2 that would result if Booster's application for a translator on output Channel 2 is granted. Mr. Campbell now alleges that such interference can be eliminated with the installation of cables that are properly shielded and matched, that some distribution lines used by H & B are parallel open wire balanced lines and that tap offs are pressure type unmatched taps on coaxial lines.

The Affidavit attached to H & B's Reply filed in this proceeding on July 18, 1968, describes the shielding H & B utilizes in making taps. Moreover, as set forth by Mr. Beaman in his Affidavit attached hereto, at all locations in Prescott where the radiation of the signal of Booster's translators into the sets of H & B subscribers has been a problem, back matched taps have been used in order to fully match drop lines, and the drop line utilized is shielded with copper braid. ~~With respect to H & B's use of parallel open wire lines, for the past three years H & B has been replacing these and other lines with solid sheath aluminum cable, and the preparatory steps for rewiring of the entire CATV system, except in remote and sparsely populated areas where the signals of Booster's translators are not received, with solid sheath aluminum cable have been taken. However, even in the areas of Prescott where solid sheath aluminum cable has been installed, interference from radiation of Booster's signals into the sets of H & B subscribers has not been~~

1/
eliminated. Moreover, as set forth in the letter attached to Mr. Beaman's Affidavit, 2/ Booster has plans to seek an increase in power for not only its existing translators, but also the translator it is applying for in this proceeding. Such a power increase, if granted, would intensify the problems operation of Booster's translator on output Channel 2 would cause H & B.

In summary, H & B agrees with Booster that operation of its translator on Channel 9 or 11 is not feasible. However, H & B believes that for the same reason Booster rejects operation on Channel 9 or 11 - adjacent channel interference to off-the-air reception - operation on Channel 2 is also not feasible. Equally important, however, is the fact that Booster's existing translators cause interference to cable reception from radiation of the signals in the receivers of H & B's subscribers, and such interference is likely to occur on cable Channel 2 if Booster's application is granted. Booster already operates four VHF translators in Prescott, and as set forth in H & B's Petition to Deny or Designate for Hearing, filed on January 22, 1968, three of these translators cause interference to H & B's off-the-air reception of Phoenix signals, cause interference because of radiation in the sets of H & B's subscribers, or both. With ample VHF service already available in Prescott from Booster's

1/ Rewiring of the Prescott CATV system will increase its channel capacity, and in July of this year microwave authorizations were granted for the delivery of two Los Angeles signals to Prescott. However, this increased channel capacity will not eliminate the problem H & B has raised about operation of Booster's translator on output Channel 2. Expanded channel capacity would, of course, have no effect on adjacent channel interference to off-the-air reception. With respect to the radiation problem, as set forth by Mr. Beaman, because of the length of the cable run from H & B's off-the-air pick up point into Prescott and the length of some cable runs from Prescott, the Phoenix signals H & B receives off-the-air must be carried on low band channels if serious degradation of these signals in much of Prescott is to be avoided.

2/ If the Commission has any doubt about H & B's standing to oppose Booster's application, these doubts should be resolved by Booster's letter.

Ben F. Waple
November 7, 1968
Page Four

other translators, H & B believes that the interest of persons who choose to subscribe to H & B's service in avoiding degradation of that service must be considered. Since Booster can provide the service it is proposing on a UHF channel without causing injury to the cable system or its subscribers, 3/ H & B urges that Booster's application of a translator operating on output Channel 2 be denied.

Respectfully submitted,

Harry M. Plotkin

George H. Shapiro

cc: Eino M. Jacobson, Esquire
Counsel for Prescott T. V. Booster Club, Inc.

3/ H & B has already indicated that it would not oppose Booster's application if it were amended to specify operation on a UHF channel.

AFFIDAVIT

Robert L. Beaman, being first duly sworn, hereby deposes and says:

I am Vice President-Engineering of H & B Communications Corporation. I have read the Affidavit dated October 9, 1968, of Wiley Campbell, Engineer for Prescott TV Booster Club (Booster).

Booster is applying for a new VHF translator station on output Channel 2 in Prescott. The translator will rebroadcast the signal of Station KAET-TV, Channel 8, Phoenix, Arizona. Mr. Campbell's Affidavit was filed in response to the Commission's letter of September 11, 1968, requesting a statement from Booster setting forth the effect of operation on output Channel 9 or output Channel 11.

With respect to the use of output Channel 9, Mr. Campbell notes that both H & B and Booster utilize off-the-air pickup of Channels 8 and 10. He does not, however, rely on this as the principal reason for rejecting the use of Channel 9. Instead, Mr. Campbell points out that Booster would be converting the signal of a station operating on Channel 8 to an adjacent channel and alleges that such adjacent channel conversions are not recommended by equipment manufacturers. With respect to use of output Channel 11, Mr. Campbell states that such conversions are possible, but he notes that both H & B and Booster

utilize off-the-air pickup of Channels 10 and 12 and refers to the difficulty in eliminating adjacent channel interference because of the small percentage difference in frequency.

While H & B believes that operation of Booster's translator on Channel 9 would be feasible by using double conversion to eliminate the equipment problem referred to by Mr. Campbell, the heart of the matter is that Mr. Campbell has now conceded that adjacent channel interference to off-the-air reception can cause problems for Booster as well as for H & B. Despite his recognition of adjacent channel interference problems if Booster operated on Channels 9 or 11, however, Mr. Campbell indicates that adjacent channel interference from a Channel 2 translator will not be a problem. The reason given by Mr. Campbell is that adjacent channel interference is easier to eliminate when there is a large percentage difference in frequency and that Booster at the present time experiences no difficulty in eliminating such interference on low adjacent channels to its own pickup of off-the-air channels.

As set forth in my earlier Affidavits of January 18, 1968 and July 15, 1968, adjacent channel interference to off-the-air reception of Channel 3 has at times been particularly severe as a result of the operation of Booster's translator on Channel 4. H & B

converts Channel 3's signal to intermediate frequencies in the 39-45 MHz range and attempts to trap out adjacent channel signals at those frequencies, thereby obtaining a greater percentage difference in frequencies than that obtained by Booster, and H & B also uses adjacent channel traps installed on H & B's receiving antenna for Channel 3. Nevertheless, adjacent channel interference as described in my earlier Affidavits remains.

H & B has also shown that operation of Booster's translator on Channel 2 will cause interference to reception on cable Channel 2 because of radiation of the signal of Booster's proposed Channel 2 translator directly into the tuners of individual receivers of H & B subscribers in Prescott. Mr. Campbell has alleged that this interference can be solved with the installation of cables and drop lines which are properly shielded and matched and that some of the distribution lines used by H & B are parallel open wire balanced lines with tap offs made on an unmatched basis on coaxial lines.

While Booster is correct in stating that some portions of the Prescott CATV system presently operate with parallel open wire lines, for the past three years H & B has been replacing these and other lines with solid sheath aluminum cable. After the rewiring

of the Prescott CATV system, described below, is completed, open wire will be used only in remote and sparsely populated locations where the signals of Booster's translators are not received because of terrain obstructions. In these locations, open wire will continue to be used because signal attenuation is much less than with shielded cable, and such lesser attenuation is required to enable H & B to serve these remote areas. In all locations in Prescott where radiation of the signal of Booster's translator into the sets of H & B subscribers has been a problem, back matched taps have been used in order to fully match drop lines, and the drop lines utilized are shielded with copper braid. H & B has been converting to back matched taps for the last three years. As set forth in my prior Affidavits, this procedure does not eliminate radiation into the sets of H & B subscribers.

Moreover, since H & B initially filed its pleading in this proceeding, it has taken the preparatory steps for rewiring all but the remote areas referred to above served by the Prescott CATV system to an all solid sheath aluminum coaxial plant with 12 channel capacity. This rewiring will insure that the cable system does not radiate into the antennas of translator viewers and that the translator signal does not radiate into the CATV system. It is anticipated that rewiring will be completed by the Summer of 1969, and by that time all taps will be back matched. However,

rewiring will not eliminate radiation directly into receivers. Even in those areas of Prescott where rewiring has thus far been completed, interference from radiation of Booster's signals into the sets of CATV subscribers has not been eliminated.

Finally, the conversion of the Prescott CATV system to a 12 channel system will not eliminate the problems previously raised by H & B. Booster itself objects to operation on Channel 9 or 11 because of adjacent channel interference problems, and H & B has shown that the same problem of additional adjacent channel interference to off-the-air reception of Channel 3 will exist if Booster is authorized to operate on Channel 2. Moreover, as set forth in the attached letter, which Booster recently sent to its members in Prescott, Booster is planning to apply for authority to increase the power of all its translators, including the translator for which authorization is sought in this proceeding, to 10 watts transmitter power output. H & B will address itself to the merits of Booster's applications for increase in power if and when they are filed, but in the meantime H & B believes that Booster's plans for increased power for the translator proposed in this proceeding are relevant in assessing the potential for adjacent channel interference from its proposed Channel 2 translator.

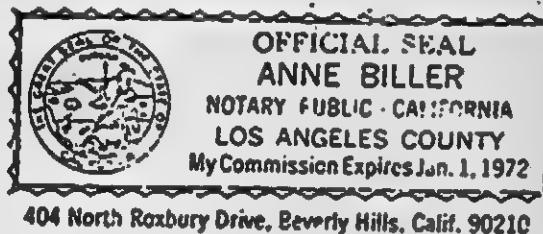
Similarly, rewiring of the Prescott CATV system will not eliminate the problem of radiation into the sets of subscribers. H & B receives the signals of the Phoenix television stations on a mountain

approximately five miles from Prescott. Because of length of the cable run into Prescott and the length of some of the cable runs from Prescott into remote areas, some of which do not receive translator service because of terrain obstructions, the signals of the Phoenix stations must be carried on low band cable channels. If they were carried on high band cable channels, the run down the mountain to Prescott would require approximately double the number of amplifiers presently used, resulting 6 db greater cross modulation and 3 db less signal to noise ratio. In these circumstances, the signals of the Phoenix stations could be seriously degraded on much of the system and unsatisfactory in the more remote areas where cable runs of well over 11 miles from the off-the-air pick-up point are involved.

Robert L. Beaman
Robert L. Beaman

Subscribed and sworn to before me this 5th day of
November, 1968.

Anne Biller
Notary Public



Eino M. Jacobson, Counsel
Wiley Campbell, Engineer
Brown & Warren, Accountants

PRESCOTT TV BOOSTER CLUB

ELKS BUILDING
P. O. Box 1990
PRESCOTT, ARIZONA 86301
Phone 445-1402

DIRECTORS
Norman M. Foster, P.
Fred W. Butte, Vice-
Harry Funk, Treas.
Bruce Fee
Osley D. Moore
Marion Perkins
Sam Steiger

Dear TV Booster Members:

~~A recent ruling of the Federal Communications Commission has opened the door to such organizations as our booster Club to increase our transmitting power to ten watts. At present we are permitted to transmit on a strength of only one watt.~~

~~Obviously such an increase of strength in our transmitting would result in a much stronger picture on your television screen and would enable the Prescott TV Booster Club to bring much finer reception to such outlying areas as Chino Valley and north.~~

We feel this is the greatest opportunity we have ever had to bring the finest possible television viewing into your homes, and we feel certain you will be as anxious as we are to take advantage of it.

~~We have contacted the Federal Communications Commission for permission to install the equipment necessary to increase to this ten watt strength. They have informed us that applications must be held in abeyance until they have approved the equipment being submitted by the suppliers, but this approval should shortly be forthcoming and our own applications will then be in order.~~

We have also contacted the suppliers to ascertain what the probable cost of the necessary equipment will be and, as we had anticipated, the cost to install it will run approximately \$1,000 per channel, or \$4,000. If and when we are able to put Channel 8 on the air this will mean an additional \$1,000.

The dues we are currently receiving from our members are sufficient to maintain current equipment, handle administration, and from time to time install or purchase small equipment. However, they are not great enough to handle a major expenditure of this nature. Therefore, if we are to be in a position to avail ourselves of this splendid opportunity, we must raise additional funds.

We ask, therefore, that each of our members - that all television viewers using antennas or rabbit ears availing themselves of the facilities provided by the Booster - make a special contribution at this time. We feel that a special contribution of \$10, in

TV Booster Members
Page 2

addition to regular membership contributions, would cover the cost of purchasing and installing the equipment and of installing equipment for Channel 8 when we receive approval from the Federal Communications Commission.

You are aware, of course, of the minimal cost of antenna viewing through the TV Booster Club in comparison with rental of the television cable which runs approximately \$5 per month in addition to the installation charge. Normally we ask only \$1 per month, or \$12 per year. An additional \$10 at this time would provide vastly improved viewing and would still cost very considerably less than the cable.

We trust you will comply with our request for this contribution as it is in your interest that we ask.

We are grateful for your past and continuing cooperation, and hope we can count on you to make this endeavor possible.

Very truly yours,

Norman Foster

Norman Foster, President
PRESCOTT TV BOOSTER CLUB

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 68-1220
24052

In re Application of:)

PRESCOTT T.V. BOOSTER CLUB, INC.)
Prescott, Arizona)

File No. BPTTV-3306

For Construction Permit for New)
VHF Television Translator Station)

MEMORANDUM OPINION AND ORDER

Adopted December 18, 1968 ; Released December 26, 1968

By the Commission: Commissioner Cox absent.

1. The Commission has before it for consideration the above-captioned application of Prescott T.V. Booster Club, Inc., requesting a construction permit for a new 1-watt VHF television broadcast translator station to serve an estimated 17,000 persons in Prescott, Arizona, by rebroadcasting Television Broadcast Station KAET, Channel *8, Phoenix, Arizona (ETV), on output Channel 2; a petition to deny, filed January 22, 1968, by H & B Communications Corporation, operator of a community antenna television (CATV) system in Prescott, and various pleadings filed in connection therewith.^{1/}

2. Petitioner claims standing in this proceeding as a "party in interest" within the meaning of Section 309(d) of the Communications Act of 1934, as amended, on the grounds that the CATV system and the translator will operate in the same community and will compete for viewers, causing the CATV system economic injury. We find that petitioner has standing. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470, 60 S.Ct. 693, 9 RR 2008.

^{1/} The Commission also has before it for consideration an opposition to the petition to deny, filed June 27, 1968, by Prescott TV Booster and a reply thereto, filed July 18, 1968, by H. & B. Prescott's responsive pleading was filed nearly 4 months beyond the time limit set by Section 1.45 of the Commission's Rules. Because of the importance of this matter, we will, upon our own motion, waive Section 1.45 of the Rules, accept the late-filed pleading, and judge this matter on its merits.

3. The only question raised by petitioner is that the translator would cause interference to reception by the CATV system's subscribers on cable channel 2 and that it will also cause adjacent channel interference to the system's reception of the off-the-air signals of Television Broadcast Station KTVK-TV, Channel 3, Phoenix, Arizona. Petitioner operates a 5-channel system which carries the signals of five Phoenix, Arizona, television broadcast stations to approximately 2,000 subscribers. The following signals are carried:

KTAR-TV (NBC), Channel 12 on cable Channel 2

KTVK-TV (ABC), Channel 3 on cable Channel 3

KOOL-TV (CBS), Channel 10 on cable Channel 4

KPHO-TV(Ind), Channel 5 on cable Channel 5

KAET (ETV), Channel *8 on cable Channel 6.

Prescott TV Booster is licensed to operate four VHF translators in Prescott and the present application represents its efforts to obtain a fifth translator which would bring to Prescott the same services off-the-air as are provided by cable by H. & B. It is apparent that there is no VHF channel available which the translator can use without causing some type of interference to the cable system.

4. Petitioner alleges that the translators which are in operation presently cause interference to the cable system's subscribers' reception and the system has attempted to minimize this interference by various techniques, including transformers installed in individual home receivers and adjacent channel traps installed into the system's off-the-air antennas. The results, petitioner states, are less than satisfactory and the translator's operation on output Channel 2 would aggravate the situation.

5. There appears to be no other VHF channel available for the applicant's use which would not meet with similar objections from petitioner. In effect, petitioner's position is that there are no channels available for the applicant's use which will not cause some type of interference to the CATV system's operation and, therefore, the translator cannot be authorized. We disagree. The problem of interference by an off-the-air television service to reception by CATV subscribers on their cable is not a new one. We have held that, under these circumstances, the CATV system is not entitled to protection against such interference under our rules. Whitesburg Television Translator, Inc., 11 FCC 2d 275, 11 RR 2d 1262.

There are techniques available to the CATV system to enable it to cope with this type of problem and we believe that it is incumbent upon the system to employ these techniques to the extent necessary to protect itself.

6. The applicant is a non-profit community organization seeking to bring to Prescott the off-the-air service of a non-commercial educational television broadcast station. We recognize that CATV systems provide a valuable and desired service to members of the public in many areas, but their service is limited to subscribers who are willing and able to pay a fee, and usually is not available even at a fee to members of the community in outlying areas. Thus, the cable system serves approximately 2,000 homes; the translator would serve approximately 5,000 homes.

7. We are not unmindful of the problems which the CATV system may encounter as the result of the activation of this new translator, but unlike viewers, the system has remedies available to it and a certain flexibility which enable it to protect itself against interference at its head end. It may, for example, relocate its head end or it may use microwave relay stations to bring the signals of the Phoenix stations to Prescott. The cable system has operated, apparently successfully, in spite of the interference which it states exists because of the translators.

8. We find that the applicant is qualified to construct, own and operate the proposed new television broadcast translator station. We further find that no material or substantial questions of fact have been raised by the pleadings and that a grant of the application would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the petition to deny filed herein by H & B Communications Corporation IS DENIED.

IT IS FURTHER ORDERED, That, upon the Commission's own motion, Section 1.45 of the Commission's Rules IS WAIVED and the late-filed reply pleading of Prescott T.V. Booster Club, Inc. IS ACCEPTED.

IT IS FURTHER ORDERED, That the above-captioned application of Prescott T.V. Booster Club, Inc. IS GRANTED in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20054

In re the Application of)	
)	
PRESCOTT T. V. BOOSTER CLUB,)	
INC., Prescott, Arizona)	
)	
For Construction Permit for a new)	File No. BPTTV 3306
VHF Television Translator Station)	
to Operate on Output Channel 2,)	
Prescott, Arizona)	
)	
TO: The Commission)	

**MOTION FOR STAY PENDING JUDICIAL
DETERMINATION OF MERITS OF APPEAL**

1. On December 26, 1968 the Commission released its Memorandum Opinion and Order in the above-captioned proceeding, in which it granted without hearing, the application of Prescott T. V. Booster Club, Inc. (Booster) for a construction permit for a new 1-watt VHF television broadcast translator station in Prescott, Arizona and denied the objections thereto filed by H & B Communications Corporation (H & B). H & B operates a CATV system in Prescott. On January 24, 1969 H & B filed a Notice of Appeal with the Court of Appeals for the District of Columbia Circuit from the Commission's Memorandum Opinion and Order in this proceeding.

This is H & B's Motion for Stay of the effectiveness of the construction permit pending the outcome of the judicial proceedings initiated by H & B, and it is being filed pursuant to Rule 18 of the Federal Rules of Appellate Procedure and Section 1.43 and related sections of the Commission's Rules.^{1/}

2. The standards for the grant of a Stay pending judicial review are set forth in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958). A party seeking a stay must show (1) likelihood of prevailing on the merits; (2) irreparable injury to the petitioner in the absence of a Stay; (3) no substantial harm to the permittee if a Stay is granted; and (4) the grant of the Stay is in the public interest. H & B's showing under these standards is set forth under the headings that follow.

(1) LIKELIHOOD OF PREVAILING ON THE MERITS

3. The signals presently carried on the Prescott CATV system, the channels on which they are carried, the signals carried by translators licensed to Booster, and the channels on which Booster's translators operate are set forth in the following table:

^{1/} All facts relied upon in this Motion are supported by Affidavits previously filed in this proceeding.

<u>Station and Channel</u> ^{2/}	<u>Translator Output Channel</u>	<u>Cable Channel</u>
KTAR-TV (NBC) Channel 12	Channel 6	Channel 2
KTVK-TV (ABC) Channel 3	Channel 7	Channel 3
KOOL-TV (CBS) Channel 10	Channel 4	Channel 4
KPHO-TV (Indep.) Channel 5	Channel 13	Channel 5
KAET-TV (Ed.) Channel 8	Construction Permit granted in this pro- ceeding for Channel 2	Channel 6

In its Petition to Deny or Designate for Hearing the above-captioned application, filed with the Commission on January 22, 1968, H & B showed the following:

(a) The operation of two translators presently licensed to Booster and operating on output Channels 4 and 6 cause interference to television reception by CATV subscribers on cable Channels 4 and 6 because of radiation of the translator signals in the sets of CATV subscribers (H & B Petition, ¶ 4(a)).

(b) The present operation of three translators licensed to Booster and operating on output Channels 4, 6 and 7

^{2/} All of these stations are licensed to communities in the Phoenix, Arizona area.

results in adjacent channel interference to off-the-air reception of three stations carried by the CATV system (Petition, ¶ 4(b)).

(c) The Prescott CATV system presently has a channel capacity of five channels, and because of the interference described in (a) and (b) above, television reception by CATV subscribers is adversely affected at present on four of these five channels (H & B Petition, ¶ 4). While rewiring of the system is planned, the signals of the Phoenix stations will continue to be carried on cable Channels 2 through 6 of the CATV system after rewiring is completed,^{3/} and expanded channel capacity will,

3/ As set forth in H & B's letter of November 7, 1968, to the Commission, expanded channel capacity would in no way alleviate the problem of adjacent channel interference to off-the-air reception. With respect to the problem of radiation of the signals of Booster's translators into the sets of H & B's subscribers, as set forth by Robert L. Beaman, Vice President-Engineering of H & B, in his Affidavit attached to H & B's letter of November 7, 1968, H & B's off-the-air reception site, where signals from five Phoenix television stations are received, is on a mountain approximately five miles from Prescott. Because of the length of the cable run into Prescott and the length of some of the cable runs from Prescott into remote areas, the signals received off-the-air must be carried on low band cable channels. If they were carried on high band cable channels, the cable run down the mountain to Prescott would require approximately double the number of amplifiers presently used, resulting in 6 db greater cross modulation and 3 db less signal to noise ratio. In these circumstances, the signals of the stations received off-the-air would be seriously degraded on much of the system and unsatisfactory in the more remote areas where cable runs of well over 11 miles from the off-the-air pick-up point are involved.

therefore, not alleviate the problems raised by H & B concerning the effect the operation of Booster's translators on reception of the Phoenix signals.

(d) Operation of the translators applied for in this proceeding will result in interference to reception on cable Channel 2, the only channel on which the Phoenix signals are not already subject to interference to reception from radiation of translator signals in the sets of subscribers or adjacent channel interference to off-the-air reception of the signal carried. Moreover, grant of this application will result in increased adjacent channel interference to off-the-air reception of Station KTVK-TV, Channel 3, Phoenix, which is already subject to serious adjacent channel interference (H & B Petition, ¶ 5).

In view of these facts, H & B argued that, if grant of an authorization in one auxiliary broadcast service (translators) will cause a substantial impairment of the service provided by a facility in a second auxiliary broadcast service (CATV), the Commission must as a minimum matter consider the effects of its action on each service, as well as the resulting gains and losses of service to the public. H & B further argued that, in view of the impairment of service operation of a translator on Channel 2 would cause to H & B's subscribers and the availability of

UHF channels for additional translator service in Prescott, Booster's application should be denied or designated for hearing.

4. In granting Booster's application and denying H & B's Petition, the Commission recognized that interference would result to H & B's CATV system. It stated (§ 3):

"It is apparent that there is no VHF channel available which the translator can use without causing some type of interference to the cable system."

Instead of weighing the gains and loss to the public from operation of a fifth VHF translator in Prescott and/or considering the alternative of UHF translator operation, the Commission merely stated:

"The problem of interference by an off-the-air television service to reception by CATV subscribers on their cable is not a new one. We have held that, under these circumstances, the CATV system is not entitled to protection against such interference under our rules. Whitesburg Television Translator, Inc., 11 FCC2d 275, 11 RR2d 1262."

The Commission then added (§ 5):

"There are techniques available to the CATV system to enable it to cope with this type of problem and we believe that it is incumbent upon the system to employ these techniques to the extent necessary to protect itself."

5. The Commission's action in this proceeding cannot

- 7 -

withstand judicial scrutiny. Initially, substantial and material questions of fact have been raised that cannot be resolved on the pleadings. H & B has shown that Booster's translator will cause two separate types of interference to reception by cable subscribers. H & B has described in detail the steps it has taken, without success, to eliminate both types of interference.^{4/} While the Commission stated that techniques are available to eliminate this interference, the only suggestion made by the Commission as to what these techniques were was set forth in Paragraph 7 of its Memorandum Opinion and Order, where the Commission stated:

"It [the CATV system] may, for example, relocate its head end or it may use microwave relay stations to bring the signals of the Phoenix stations to Prescott."

Such remedies would have no effect on the radiation of Booster's signals in the sets of the CATV system's subscribers. Indeed, in other situations, the Commission has itself recognized that there is no ready solution to interference to reception caused by on-channel radiation of local signals in the sets of CATV subscribers. Midwest Television, Inc. (KFMB-TV), 13 FCC2d 478 (1968) at ¶¶ 68-70, Akron Telcrama, Inc. (Initial Decision) _____ FCC2d _____, 14 RR2d 657 (1968), at ¶¶ 26, 27. With respect to adjacent channel interference

(62)

^{4/} See Affidavits of Robert L. Beaman dated January 18, 1968, July 15, 1968, and November 5, 1968. These Affidavits are attached to H & B's Petition to Deny or Designate for Hearing filed on January 22, 1968, its Reply filed on July 18, 1968, and its letter of November 7, 1968.

to off-the-air reception, there is nothing in the record in this proceeding that would indicate that choice of another head end site from which the Phoenix signals can be received would eliminate the problem. The other alternative suggested by the Commission, the use of microwave facilities, will be discussed below in connection with the Commission's failure to even attempt to weigh the various public interest factors involved. In any event, even if only the interference resulting from radiation in the sets of receivers is considered, such interference already exists on Channels 4 and 6 and will be caused on Channel 2 by the translator authorized in this proceeding. There still remains, therefore, a substantial and material question of fact whether there is any feasible way to eliminate such interference and whether the grant of an application that will increase the number of channels subject to such interference will serve the public interest, convenience and necessity. Nothing in the Commission's Memorandum Opinion and Order in any way resolves these questions. In these circumstances, Section 309 of the Communications Act requires that Booster's application be designated for hearing. See, e.g., West Michigan Telecasters, Inc. v. Federal Communications Commission, 396 F.2d 688 (1968); Folkways Broadcasting Co., Inc. v. Federal Communications Commission, 375 F.2d 299 (1967).

6. Equal in importance to the Commission's failure to recognize that substantial and material questions of fact remain unresolved was

its failure to consider the gains and losses in service to the public resulting from its action granting Booster's application. The very case relied on by the Commission for its determination that CATV systems are not entitled to protection against interference by translators, Whitesburg Television Translator, Inc., 11 FCC2d 275 (1968), involves such a consideration of the gains and losses in service to the public. In Whitesburg, the CATV system alleged that grant of a translator application would result in adjacent channel interference to reception of one signal carried by the CATV system. There was no allegation that other signals carried by the CATV system were subject to interference from any other source. No showing was made that shielding and filtering techniques would not eliminate adjacent channel interference by the translator. The signal subject to adjacent channel interference was that of an NBC affiliate, and the CATV system carried the signal of another NBC affiliate. Finally the grant of the application would make available off-the-air the signal of only a second full network affiliated station in the Whitesburg area. Only after considering all of these factors did the Commission grant the application in Whitesburg.

7. There is no similarity between the situation in Prescott and in Whitesburg. In Prescott, four signals are already available by VHF translator, including the signals of affiliates of each of the three

networks. Translator operation in Prescott already causes interference to CATV reception on four CATV channels. A detailed showing was made by H & B that shielding, filtering and other techniques had been attempted in Prescott, with unsatisfactory results. A showing was also made that operation of a fifth VHF translator on Channel 2 in Prescott would cause interference on cable Channel 2, on which the only NBC affiliate on the system is carried, and would cause increased adjacent channel interference to reception of Station KTVK-TV, the only ABC affiliate carried by the CATV system. Nevertheless, without recognizing any differences between the situations in Prescott and Whitesburg, the Commission, on the authority of Whitesburg granted Booster's application.

8. As part and parcel of its failure to consider gains and losses in service resulting from grant of Booster's application, the Commission also failed to consider a readily available alternative means of authorizing new translator service in Prescott. From the beginning of this proceeding, H & B has made it clear that it would not oppose a UHF translator in Prescott. For many years the Commission has been encouraging the development of UHF. In 1962, at the Commission's urging, Congress passed the All Channel Receiver Law, 76 Stat. 150 (1962), requiring that all television sets shipped in interstate commerce be equipped to receive UHF signals. As a result of passage of that law,

since 1963 the American public has been paying more than would otherwise be necessary for its television receivers to cover the additional cost of equipping them to receive UHF signals. Much of the impetus for the Commission's regulation of CATV derives from the Commission's desire to encourage the development of the UHF band. See Second Report and Order on CATV, 2 FCC2d 725 (1966), at §§ 111 - 153. Even in the translator field, the Commission has on several occasions offered VHF translator applicants an opportunity to specify operation on UHF channels when it felt that operation in the VHF band raised public interest problems. See Public Notice dated September 5, 1968 (Broadcast Actions Report No. 7537), in which the Commission stated that it was unable to find that an application for a VHF translator filed by United Artists Broadcasting, Inc. in Mansfield, Ohio, would serve the public interest and provided the applicant an opportunity to dismiss its application or file for a UHF translator within 60 days; see also Public Notice of October 10, 1968 (Broadcast Action Report No. 7615) offering Columbia Broadcasting System, Inc. an opportunity to dismiss its application for a VHF translator in Valparaiso, Indiana and to file a new application for a UHF translator. In this proceeding, however, rather than taking a similar course or at least designating Booster's application for hearing so that the public interest questions raised could be considered and resolved on a full factual record, the Commission granted Booster's application and gratuitously suggested that H & B

move its head end site or apply for microwave facilities to bring in the Phoenix signals.

9. This action by the Commission is clearly contrary to the requirements of cases such as Television Corporation of Michigan v. Federal Communications Commission, 294 F.2d 730 (1961), where the Court held that, in acting on broadcast applications, deprivation of service to any group was undesirable and could be justified only by offsetting factors. Here, the Commission took the very approach proscribed in Television Corporation of Michigan. It said in effect that impairment of CATV service is irrelevant when new translator service is involved. It failed to weigh the loss to the public from impairment of CATV service or to even mention the possibility of UHF operation for the translator. No consideration was given to the interest of those members of the public who subscribe to CATV service in being able to receive at least one channel of service trouble-free. Instead, the interests of the CATV system and its subscribers in preventing a further deterioration of CATV service from the translator operation were considered only to the extent of a suggestion that the CATV move its head end or utilize microwave facilities, without regard to the possible cost of this proposal to the CATV system or ultimately, to its subscribers, and without comparison with or consideration of the cost or feasibility of UHF translator service by Booster.

Again, such an approach cannot withstand judicial scrutiny.

10. The Commission's action in this proceeding is sustainable only if it can be concluded that the Commission does not believe that CATV service has any significant public interest attributes. But it is clear that this is not the case. As recently as December 13, 1968, in its Notice of Proposed Rule Making in Docket No. 18397, FCC 68-1176 (released December 13, 1968), the Commission recognized both the present and potential future contribution CATV is making and can make in providing service to the public. Perhaps the most immediate relevance of that proceeding in places such as Prescott is the Commission's proposal to require CATV systems to originate significant amounts of local programming, something that is not authorized and probably not feasible for translators. Such recognition for the role of CATV and the proposal to require CATV origination is completely inconsistent with the Commission's cavalier statement in this proceeding that a CATV system is not entitled to protection against interference from translators, at least where translator operation causes as much havoc for CATV systems as is the case in Prescott. It is also difficult to see how a CATV system can be expected to meet the program origination requirement the Commission is seeking to impose when the Commission refuses to recognize any legitimate concern on the part of CATV systems for the basic product they sell--good and trouble-free reception of television

signals.

(2) IRREPARABLE INJURY

11. At the present time H & B's CATV system carries the programming of the three major national networks, one independent station, and one educational station. Of the five signals carried, only the programming on Cable Channel 2--Station KTAR-TV, an NBC affiliate--is free of interference caused by Booster's currently operating translators. When and if Booster begins broadcasting under its present grant, radiation into the individual sets of H & B's subscribers from the new translator will mean the loss of their last interference-free channel. The programming which they will not be able to view without interference while the judicial proceedings initiated in this case are being resolved will be irreparably lost to them. Even if H & B ultimately prevails on the merits, its subscribers will never be able to view without interference the programs interfered with by the new translator's operations while this appeal is pending.

12. In addition to the harm caused its subscribers, H & B may be harmed by a loss of some of these subscribers. If H & B's subscribers begin having difficulties with their last clear channel, they may very well cancel their subscriptions, thereby causing H & B irreparable injury.

(3) HARM TO BOOSTER IF THE STAY IS GRANTED

13. Since Booster will not have to cease supplying a service which it currently provides, neither it nor its viewers will be harmed through the loss of any existing service. In addition, since Booster is a non-profit organization, grant of the Stay requested herein will not result in a loss of any potential profits. Moreover, in view of the fact that Booster already makes available four off-the-air signals in Prescott, this is not the kind of exceptional situation in which the public interest requires that construction begin immediately. Compare J. R. Karban, 20 RR 828 (1960).

(4) THE PUBLIC INTEREST

14. In the circumstances of this proceeding, the public interest would be best served by staying the effectiveness of Booster's construction permit until the Court of Appeals rules on the merits of this appeal. Four off-the-air services will remain available in Prescott, and the Prescott CATV system will not suffer further impairment of its service. Grant of a stay will in addition, also insure that Booster, a non-profit organization, does not expend its funds to construct a facility it may ultimately be prohibited from using.

15. For the foregoing reasons, H & B urges that the Commission stay the effectiveness of the construction permit granted

in this proceeding pending a decision by the Court of Appeals on H & B's appeal.

Respectfully submitted,

/s/ Harry M. Plotkin
Harry M. Plotkin

/s/ George H. Shapiro
George H. Shapiro

Arent, Fox, Kintner, Plotkin & Kahn
1100 Federal Bar Building
Washington, D. C. 20006

Counsel for H & B Communications
Corporation

January 27, 1969

CERTIFICATE OF SERVICE

I, Sheila Greenstein, do hereby certify that I have, this 27th day of January, 1969, sent by United States air mail, postage prepaid, copies of the foregoing "Motion for Stay Pending Judicial Determination of Merits of Appeal" to the following:

Henry Geller, Esquire*
General Counsel
Federal Communications Commission
Washington, D. C. 20554

Eino M. Jacobson, Esquire
Post Office Box 1031
Prescott, Arizona 86301
Counsel for Prescott T. V. Booster
Club, Inc.

Sheila Greenstein

* Surface mail

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 69-217
27719

In re Application of:)
)
PRESCOTT T. V. BOOSTER CLUB, INC.) File No. BPTTV-3306
Prescott, Arizona)
)
For Construction Permit for New)
VHF Television Broadcast)
Translator Station)

O R D E R

Adopted March 5, 1969 ; Released March 12, 1969

By the Commission: Commissioner Bartley absent; Commissioner Wadsworth
dissenting.

1. The Commission has before it for consideration a "Motion For Stay Pending Judicial Determination of Merits of Appeal", filed January 27, 1969, by H & B Communications Corporation, requesting that the Commission stay the effectiveness of its Order (Prescott T.V. Booster Club, Inc., 15 FCC 2d 73, 15 R.R. 2d 733) granting without hearing the above-captioned application of Prescott T.V. Booster Club, Inc., for a construction permit for a new 1-watt VHF television broadcast translator station to serve Prescott, Arizona, by rebroadcasting Television Broadcast Station KAET, Channel *8, Phoenix, Arizona, on output Channel 2. Petitioner states that, on January 24, 1969, it filed a Notice of Appeal with the United States Court of Appeals for the District of Columbia Circuit, asking review of the Commission's above-referenced Memorandum Opinion and Order.

2. Petitioner's motion for stay is based on the contention that there is a likelihood of success on the merits in Court, that a stay would not cause the applicant economic injury, that failure to grant a stay would result in irreparable injury to petitioner, and that a stay would be in the public interest. We will consider each of these allegations.

3. Basically, petitioner's contention that it can succeed on the merits rests on its assertions that the Commission's action fails to fully protect one "auxiliary broadcast service" against interference by another; that the Commission did not discuss or consider the feasibility of operation of a UHF translator by the applicant; 1/ and that the Commission did not weigh the gains and losses in service to the public which would result from its action.

1/ In its petition to deny, petitioner did not raise the UHF question directly but mentioned, as an incidental matter, that the applicant could provide a fifth service on a UHF channel.

4. We answer the first contention with the observation that CATV is not a broadcast service and because its service is limited to private parties who have entered into contractual obligations for its service, it stands in a different posture than off-the-air broadcast service such as a translator provides. Community Television, Inc. v. United States of America and Federal Communications Commission U.S.C.A., 10th Cir., January 3, 1969, 15 R.R. 2d 2001. Translators are broadcast stations which provide the television service which regular television stations, for various reasons, are unable to provide. For this reason, we have accorded them a status similar to that of regular television stations and have not required them to protect CATV systems against interference. We have never applied this policy inflexibly and we have recognized that conditions may exist where the policy would be inappropriate, such as where a translator might be deliberately designed to cause interference to a CATV system. In other instances, we have expressed our desire to avoid such interference where possible, Tri-State Television Translators, Inc., 9 FCC 2d 764, 11 R.R. 2d 4, and we have urged cooperation between translators and CATV systems to enable them to exist harmoniously. Whitesburg Television Translator, Inc., 11 FCC 2d 275, 11 R.R. 2d 1262; Show Low Area TV Service, FCC 69-34, released January 15, 1969

5. The answer to the last contention is that the Commission's decision was, in large part, based on its careful weighing of the gains and losses, and in our opinion we pointed out the fact that far more people would be served by the translator than by the CATV system. We concluded that, on balance, the gains outweighed the losses.

6. As to the feasibility of a UHF translator, we cannot conclude that it would be appropriate to require this applicant to shift to a UHF frequency. The applicant is a non-profit community-type organization, wholly dependent upon voluntary contributions from members of the public for its support, whose financial base is not assured and, as a community-sponsored organization, who is responsible to its supporters for the preservation of its assets. The service it proposes to bring to Prescott is that of a non-commercial educational television station, an objective clearly consistent with the public interest. The applicant exists by virtue of the demands of the community for the off-the-air broadcast service it provides. With these facts in mind, we have examined the applicant's financial position. The applicant presently operates four VHF translators in Prescott (K04AI, K06AE, K07AP, and K13FY), the operating and maintenance costs of which are met by voluntary contributions. The applicant estimated that construction costs for its fifth translator would be approximately \$1,400 plus \$600 for expenses in its first year. Its income consists of subscriptions of \$1.00 per family per month and, in the nine months ending September 30, 1967, it realized \$7,090 from this source. Obviously, it has the resources to construct and operate an additional VHF translator.



7. A UHF translator station, completely installed and ready for operation, costs between \$10,000 and \$15,000 and, depending upon a variety of factors, may go as high as \$25,000, but seldom lower than \$8,000. ^{2/} The costs of operation of a UHF translator are proportionately higher than for a VHF translator. Moreover, since no UHF television station or UHF translator provides service to Prescott, there has been no special incentive to UHF receiver conversion. American Research Bureau (ARB), which publishes data on the extent of UHF receiver set conversion, has furnished no figures for the Prescott area, but its data on the closest market (Phoenix) indicates that, as of November, 1968, UHF receiver set saturation was about 59%, very close to the national average. Under the circumstances of this case, we did not believe it appropriate to suggest a UHF frequency as a reasonable alternative

8. The foregoing discussion brings us to the conclusion that the petitioner has not established the likelihood of its succeeding on the merits of its appeal. Therefore, we do not believe that grant of the stay requested by the petitioner would be in the public interest. However, since the petitioner has appealed the Commission's decision to the United States Court of Appeals of the District of Columbia Circuit, we believe that it would be appropriate to stay our decision temporarily to permit the petitioner, if it desires to do so, to ask the Court to stay the Commission's decision pending a Court review, and to give the Court time to pass on such a request. Therefore, we will stay our decision of December 18, 1968, granting the above entitled application, for a period of fifteen (15) days from the date of release of this Order. If the petitioner requests a stay of the Court within such time period, our stay will remain in effect until the Court acts upon the petitioner's stay request.

9. Accordingly, IT IS ORDERED, That the "Motion for Stay Pending Judicial Determination of Merits of Appeal" filed herein by H & B Communications Corporation IS GRANTED to the extent indicated above and IS OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple

Ben F. Waple
Secretary

^{2/} Based on information from the Commission's public files.

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CASE NO. 22,685

H & B COMMUNICATIONS CORPORATION,
Appellant,

V.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

PRESCOTT TV BOOSTER CLUB, INC.,
Intervenor,

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 8 1969

ON APPEAL FROM A MEMORANDUM
OPINION AND ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION

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April, 1969

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STATEMENT OF THE ISSUES
PRESENTED FOR REVIEW

By Prehearing Order dated February 26, 1969, this Court approved the Prehearing Stipulation of the Appellant and the Appellee which set forth the issues presented for review.

As set forth in the Prehearing Stipulation, the Appellant believes that this appeal presents the following issues for review:

1. Whether the Commission applied an incorrect standard in granting, without hearing, an application for a new VHF translator in Prescott, Arizona over the objections of the Appellant when it failed to consider the impairment of television service that would result to members of the public subscribing to Appellant's CATV service in Prescott if it granted the application and it failed to weigh that impairment against the gain in service to the public from the operation of a fifth VHF translator.

2. Whether the Commission erred in concluding, without holding a hearing, that methods existed to eliminate translator-caused interference to television reception by CATV subscribers in Prescott, Arizona, and that accordingly no substantial and material questions of fact had been raised by the Appellant when

A. Appellant showed that four existing VHF translators licensed to the applicant for a fifth VHF translator in Prescott caused two separate kinds of interference to the signals received by subscribers to

Appellant's CATV system.

B. Appellant showed that its subscribers would encounter additional interference to television reception similar to that already received if the application for the fifth VHF translator were granted, and

C. Appellant showed the numerous steps it had taken, without success, to eliminate such interference from the existing translators.

3. Whether the Commission erred in granting without hearing an application for a new VHF translator in Prescott, Arizona, that would cause interference to television reception by CATV subscribers without also considering the possibility of operation of the proposed translator on a UHF channel where no interference to CATV reception would be caused.

4. Whether the Commission's Memorandum Opinion and Order granting the application fails to contain a concise statement of the basis for its action and its reasons for granting without a hearing the translator application and denying the Appellant's objections thereto.

As also set forth in the Prehearing Stipulation, the Appellee believes that the only issue presented of review is as follows:

Whether a CATV system is entitled to protection from translator caused interference.

STATEMENT PURSUANT TO GENERAL
RULE 8(d) OF THIS COURT

This case has not previously been before this Court. A Motion for

Stay of the Order under appeal in this proceeding is presently pending before this Court.

STATEMENT OF THE CASE

This is an appeal filed pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b)(6), from a Memorandum Opinion and Order of the Federal Communications Commission (A. 53-55) released on December 26, 1968, granting the application of Prescott T. V. Booster Club, Inc. (Booster) for a construction permit for a new VHF translator station^{1/} on output channel 2 in Prescott, Arizona, and denying the Petition to Deny or Designate for Hearing (A. 1-14) filed by H & B Communications Corporation (H & B).

On December 22, 1967, the Commission accepted for filing Booster's application for the construction permit referred to above (A. 1). Pursuant to

^{1/} The Commission has defined a translator station in § 74.701(a) of its Rules and Regulations, 47 C.F.R. § 74.701(a), as

"A station in the broadcasting service operated for the purpose of retransmitting the signals of a television broadcast station, another television broadcast translator station, or a television translator relay station, by means of direct frequency conversion and amplification of the incoming signals without significantly altering any characteristic of the incoming signal other than its frequency and amplitude, for the purpose of providing television reception to the general public."

Subsection (c) of the same rule defines a VHF translator as, "A television broadcast translator station operating on a VHF television broadcast channel." This Court has dealt with television translator matters and is familiar with the basic operation of translator stations from such recent cases as, Frontier Broadcasting Company v. Federal Communications Commission, Case Nos. 21,594 and 21,598 (D. C. Cir., decided February 26, 1969).

Section 309(d) of the Communications Act, 47 U.S.C. §309(d), and Section 1.580(i) of the Commission's Rules and Regulations, 47 C.F.R. §1.580(i),
^{2/}
H & B, owner and operator of a CATV system serving Prescott, Arizona, filed a petition requesting that Booster's application be denied or designated for hearing to determine whether the public interest, convenience, and necessity would be served by the grant thereof (A. 14).

The channel capacity of the Prescott CATV system is at present limited, and it is only able to carry the signals of five television stations. The signals carried are those of five stations operating in the Phoenix, Arizona television market. Booster operates four television translator stations serving Prescott. These four translators rebroadcast the programming of four of the five stations carried by the Prescott CATV system. The fifth translator, applied for in this proceeding, would rebroadcast the signal of the fifth station carried by the Prescott CATV system.
^{3/}
The television stations whose signals are

^{2/} The Commission's definition of a community antenna television (CATV) system appears in §74.1001(a) of its Rules and reads in pertinent part, as follows:

"The term 'community antenna television system' ('CATV system') means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service..."

The Court's definition of a CATV system is contained in Clarksburg Publishing Co. v. Federal Communications Commission, 96 App. D.C. 211, n. 16 at p. 217; 225 F.2d 511 n. 16 at p. 517 (1955).

^{3/} Although grant of Booster's application here at issue will enable Booster's translators to rebroadcast all signals presently (continued on page 5)

made available in Prescott by H & B and Booster, their networks, the channels on which they operate, and the channels on which they are transmitted by H & B and rebroadcast by Booster are summarized in the following table (A. 3):

<u>Station, Network and Channel</u>	<u>Translator Output Channel</u>	<u>Cable Channel</u>
KTAR-TV (NBC), Channel 12	Channel 6	Channel 2
KTVK-TV (ABC), Channel 3	Channel 7	Channel 3
KOOL-TV (CBS), Channel 10	Channel 4	Channel 4
KPHO-TV (Indep.), Channel 15	Channel 13	Channel 5
KAET-TV (Ed.), Channel 8	Construction permit granted in this pro- ceeding for Channel 2.	Channel 6

3/ carried by the Prescott CATV system, the matter of economic competition with Booster was raised solely for the purpose of showing that H & B was a party in interest with standing to file its Petition (A. 2). H & B objected to Booster's application because of the technical problems the Prescott CATV system would encounter as a result of Booster's operations (A. 7-14). Moreover, H & B is in the process of rewiring the Prescott CATV system to increase its channel capacity (A. 43, 48-50), and when rewiring is completed, it plans to commence carriage of the signals of two television stations in Los Angeles, California (A. 43). The Commission has granted microwave applications authorizing delivery of these signals to Prescott. See applications of American Television Relay, Inc., File Nos. 2152-2156-C1-P-67, granted on July 22, 1968. As set forth in the Affidavit dated November 5, 1968, of H & B's Vice President-Engineering, Robert L. Beaman, rewiring will not eliminate the interference problems Booster's translators cause to reception of the Phoenix stations over H & B's system (A. 48-50), and the Commission did not suggest that the interference problems raised by H & B be alleviated by rewiring.

In its Petition, supported by the Affidavit of Mr. Beaman, H & B showed that operation of Booster's four presently licensed translators caused two types of interference to reception on its CATV system. The first type of interference results from the fact that two of Booster's translators rebroadcast signals on two of the same channels (Channels 4 and 6) over which the CATV system also distributes signals. The translator signals on these channels radiate directly into the tuners of individual receivers and cause interference in the form of fine diagonal lines (and occasionally a vertical bar) on the television screens of CATV subscribers who happen to be tuned in to cable Channels 4 or 6. While the intensity of the lines varies in different areas of Prescott, radiation directly into sets of CATV subscribers causes significant reception problems in approximately 40 percent of the CATV homes in Prescott (A. 3, 10-11).

The second type of interference is caused by the operation of Booster's translators on channels adjacent to those on which three of the Phoenix television stations operate. Cable Channel 3 carries the signal of off-the-air Channel 3 from Phoenix, while a translator operates on output Channel 4; cable Channel 5 carries the signal of off-the-air Channel 5 from Phoenix, while a translator operates on output Channel 6; cable Channel 6 carries off-the-air Channel 8 from Phoenix and a translator operates on output Channel 7. The translators' operation on these adjacent channels causes interference to the CATV system's off-the-air reception

of the Phoenix stations to varying degrees, depending upon factors such as atmospheric conditions. When this type of interference occurs, it appears on the television screens of CATV subscribers as a herring bone effect or a beaded horizontal line moving up and down, accompanied by a vertical bar moving back and forth. In general, adjacent channel interference of this type occurs about two days per month, but Channel 3 has been the most severely affected in the past and in the summer of 1967, it had interference for 60 continuous days (A. 4, 11-12). Thus, the first type of interference (hereinafter referred to as "on-channel radiation") affects television reception on cable Channels 4 and 6, and the second type of interference (hereinafter referred to as "adjacent channel interference") affects reception of the signals carried on cable Channels 3, 5 and 6. Only cable Channel 2 is presently free of interference caused by the operation of Booster's translators (A. 5).

Mr. Beaman described in detail the steps H & B has taken, without success, to eliminate the interference caused by Booster's already licensed operations (A. 11, 12). Based on H & B's experience with interference from Booster's presently operating translators and its unsuccessful efforts to eliminate the interference, H & B showed that operation of a fifth translator on output Channel 2 would similarly result in interference from on-channel radiation of the translator's signal in the sets of H & B's subscribers on cable Channel 2, the only CATV channel on which the Phoenix signals are not subject to translator caused inter-

ference, and in increased adjacent channel interference to off-the-air reception of station KTVK-TV, Channel 3, Phoenix, which is already subject to serious adjacent channel interference from Booster's Channel 4 translator (A. 5-6, 13). H & B also pointed out that UHF channels were available for additional translator operation in Prescott. In view of these facts, H & B urged that, since Booster already provides the residents of Prescott with four channels of off-the-air television service, it could provide a fifth channel of off-the-air television service on a UHF channel, its present operation already impairs the service offered by the Prescott CATV system, and grant of its Channel 2 application would further seriously impair CATV service in Prescott, Booster's Channel 2 application should be denied or designated for hearing (A. 7-8).

Booster, in its reply to H & B, dated May 28, 1968, did not contest the facts shown by H & B concerning translator caused interference to CATV reception, though Booster did allege that means existed to eliminate such interference (A. 15-24). In its reply to Booster, H & B supplemented the showing made in its initial petition concerning the steps it has taken to eliminate translator caused interference (A. 26-28, 31-34).

Noting the desirability of avoiding interference problems, the Commission wrote Booster on September 11, 1968 stating:

"On the basis of the information presently available to the Commission, it appears that operation by the proposed translator station on any VHF output channel on the lower 5 channels (Channels 2 through 6) may cause interference to reception by the subscribers to the CATV system

operated by H & B Communications Corporation on their cable as well as to the CATV system's off-the-air pick-up of incoming signals ... A question arises, therefore, as to whether operation of the proposed translator on output Channel 9 or 11 instead of output Channel 2 would not be more in the public interest. "

Booster was therefore requested to inform the Commission of the effect of operation on Channels 9 or 11 instead of Channel 2. Booster answered that technical problems would prevent operation on Channel 9 and that it would experience difficulty in eliminating adjacent channel interference to its reception on Channel 11, and it again alleged that translator caused interference on H & B's system could be eliminated (A. 37-40). H & B replied to Booster's letter on November 7, 1968, agreeing that translator operation on Channel 9 or 11 is not feasible and showing that the methods proposed by Booster to eliminate translator caused interference had either been tried or would not work (A. 41-49). By Affidavit of Mr. Beaman (A. 45-50), H & B denied that Booster's proposed solutions would end the CATV system's interference problems.

By Memorandum Opinion and Order released December 26, 1968 (A. 53-55), the Commission granted Booster's application and denied H & B's petition. The Commission recognized that interference would result to H & B's CATV system. It stated (A. 54):

"It is apparent that there is no VHF channel available which the translator can use without causing some type of interference to the cable system. "

Instead of weighing the gains and losses to the public from operation of a fifth VHF translator in Prescott and/or considering the alternative of UHF

translator operation as a means of eliminating the losses while preserving the gains, the Commission merely stated (A. 54):

"The problem of interference by an off-the-air television service to reception by CATV subscribers on their cable is not a new one. We have held that, under these circumstances, the CATV system is not entitled to protection against such interference under our rules. Whitesburg Television Translator, Inc., 11 FCC2d 275, 11 RR2d 1262."

It later noted that the translator serves more people than the CATV system (A. 55) but did not explain why this gain in service to translator viewers outweighed the impairment in service to CATV subscribers. Indeed, the Commission brushed aside the impairment to CATV reception with the following statement (A. 55):

"There are techniques available to the CATV system to enable it to cope with this type of problem and we believe that it is incumbent upon the system to employ these techniques to the extent necessary to protect itself."

The Commission did not indicate what these techniques were, though it added a paragraph and a half later (A. 55):

"It [the CATV system] may, for example, relocate its head end or it may use microwave relay stations to bring the signals of the Phoenix stations to Prescott."

It is not clear from the Commission's decision whether these were the methods the Commission had in mind for coping with interference or whether these possibilities were alternative to the unspecified techniques earlier referred to by the Commission. There was nothing in the record before the Commission or in its opinion to indicate that choice of another

head end site was feasible or that such a site would eliminate the interference problems. Similarly, there was nothing in the record or in the Commission's opinion about the cost of microwave relay stations, whether the operation of microwave relay stations would eliminate the problems complained of, or the cost and feasibility of using other techniques, such as requiring Booster's translators to operate on UHF frequencies, to eliminate the interference problems. Finally, the Commission did not discuss why the availability of UHF frequencies for Booster's proposed translator did not raise serious questions, requiring resolution in a hearing, about whether Booster's application for Channel 2, which would cause interference to H & B's CATV system, should be granted.

H & B filed this appeal from the Commission's decision on January 24, 1969, and on January 27, 1969, it filed with the Commission a motion for stay pending the outcome of this appeal (A. 56-72). By Order released March 12, 1969 (A. 73-75), the Commission stated that it did not believe H & B had established the likelihood of succeeding on the merits of this appeal and that it therefore did not believe that grant of the stay requested by H & B would be in the public interest. However, in view of the pendency of this appeal, the Commission believed that it would be appropriate to stay its decision temporarily to permit H & B, if it desired to do so, to ask this Court to stay the Commission's decision pending judicial review. The Commission therefore stayed its decision for 15 days and provided that,

if H & B sought a stay from this Court with that 15 day period, the Commission's stay would remain in effect until this Court ruled on H & B's stay motion (A. 75). H & B filed a Motion for Stay with this Court on March 27, 1969, and that motion is presently pending before the Court.

SUMMARY OF ARGUMENT

I.

The Commission's Memorandum Opinion and Order under review in this proceeding fails to set forth a "concise statement of the reasons for denying the petition," as required by Section 309(d)(2) of the Communications Act. H & B argued below that, in acting on Booster's application, the Commission must weigh the loss to the public resulting from translator caused interference against any gains from grant of the translator application. The Commission held that its rules do not provide for protection against translator caused interference. If the Commission then proceeded to weigh the gains against the losses resulting from grant of the application, it did not set forth the reasons for determining that the gains outweighed the losses. Similarly, although H & B made a detailed showing of the means it utilized in an attempt to eliminate translator caused interference (A. 11, 12, 31-34, 45-49), the Commission held that techniques exist to cope with translator caused interference, without indicating what those techniques were and whether they were different from the techniques already tried by H & B. Later in its opinion the Commission also

suggested remedies allegedly available to the CATV system, such as moving its head end, but did not indicate whether these remedies were included in the techniques available for coping with the interference or what significance, if any, it placed on these remedies. In these circumstances, it is difficult, if not impossible, for a court to review the validity of the Commission's action. West Michigan Telecasters, Inc. v. Federal Communications Commission, ____ App. D. C. ____, 396 F.2d 688 (1968).

II.

In denying H & B's petition, the Commission, citing Whitesburg Television Translator, Inc., 11 FCC 2d 275 (1968), held that under its rules CATV systems are not protected against translator caused interference. However, in the Whitesburg case, the Commission had carefully weighed the gains and losses to each service before granting the application. If any attempt was made to weigh the gains and losses to the public in Prescott that would result from grant of Booster's application, the Commission's reasons for determining that the gains outweighed the losses were not set forth. Moreover, despite a long standing Commission policy of encouraging the development of UHF, extensive efforts on the Commission's part to create conditions that would make use of UHF channels a feasible alternative to operation on VHF channels, and recent indications of the Commission that it believes that its UHF

policy has met with substantial success, the Commission failed to consider, as part of the weighing process, the possibility of Booster operating its proposed translator on a UHF channel, where no new interference to CATV reception would be caused.

In Clarksburg Publishing Co. v. Federal Communications Commission, 96 App. D. C. 211 at p. 217, 225 F. 2d 511 at p. 517 (1955), this Court recognized that CATV systems provide television service to the members of the public who are their subscribers and that such service must be considered as television service by the Commission in acting upon broadcast applications. Even where broadcast service is not protected under the Commission's rules, this Court has held that the Commission must, upon an appropriate showing, take into account impairments of service. Interstate Broadcasting Company v. Federal Communications Commission, 116 App. D. C. 327, 323 F. 2d 797 (1963). And in considering impairments of service, the Commission's duty goes beyond merely balancing gains and losses and granting applications if the gains are numerically larger than the losses. Instead, deprivation of service to any group can be justified only by offsetting factors. Hall v. Federal Communications Commission, 99 App. D. C. 86, 237 F. 2d 567 (1956); Television Corporation of Michigan v. Federal Communications Commission, 111 App. D. C. 101, 294 F. 2d (1961).

The Commission's decision in this proceeding ignores these cases. It considers only the gains that would result from the authorization of a fifth VHF translator service in Prescott and considers neither

the losses nor the alternative of authorizing additional translator service in Prescott on a UHF channel, when no losses in CATV service to the public would occur. The Commission's failure to recognize any legitimate concern on the part of CATV systems in preserving the basic service they offer - good and trouble free television reception - is difficult to reconcile with the Commission's recognition of the future role CATV may play in the national communications system and the Commission's efforts to require CATV systems to originate significant amounts of local programming. See Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397, 15 FCC 2d 417 (1968).

III.

In its pleadings below, H & B showed in some detail the steps it had taken, without success, in an effort to eliminate translator caused interference, including use of all of the methods suggested by Booster (A. 11, 12, 31-34, 45-49). While H & B's showing was controverted by Booster, as a minimum matter, the factual allegations were squarely in dispute. The Commission, in ruling on the matter, merely stated that there were techniques available to the CATV system to enable it to cope with the interference and that it was incumbent on the system to employ those techniques.

The pleadings of the parties left unresolved substantial and material questions of fact concerning whether there were techniques

available for the CATV system to utilize in coping with translator caused interference, and the Commission's opinion does not indicate how it was able to resolve these questions on the basis of the pleadings before it or what techniques it had in mind for eliminating translator caused interference. In these circumstances, Section 309(e) of the Commission's Communications Act, 47 U.S.C. §309(e), requires that Booster's application be designated for hearing. See, e.g. West Michigan Telecasters, Inc. v. Federal Communications Commission, ____ App. D. C. ____, 396 F. 2d 688 (1968); Folkways Broadcasting Co., Inc. v. Federal Communications Commission, 126 App. D. C. 123, 275 F. 2d 299 (1967).

The Commission also suggested that a CATV system has remedies and flexibility available to it, such as moving its head end or utilizing microwave relay, for dealing with translator caused interference. While it does not appear that these were the techniques earlier referred to by the Commission for coping with translator caused interference, even these remedies raise problems. Neither will have any effect on interference caused by on-channel radiation, which occurs not at the CATV head end, but at the sets of CATV subscribers. With respect to adjacent channel interference, nothing in the record in this proceeding indicates that there is another site available in Prescott where the Phoenix signals can be received or that translator caused interference could be eliminated at another site if one could be found. Thus, even if these remedies were the techniques the Commission had in mind, there remained substantial

and material questions of fact concerning whether even these remedies would be effective in eliminating translator caused interference.

ARGUMENT

I. THE COMMISSION FAILED TO ISSUE A CONCISE STATEMENT OF ITS REASONS FOR GRANTING WITHOUT HEARING BOOSTER'S APPLICATION AND DENYING H & B'S OBJECTIONS THERETO.

The Commission's Memorandum Opinion and Order under review in this proceeding holds that CATV systems are not entitled under the Commission's Rules to protection against translator caused interference.^{4/} H & B did not argue below that the Commission's Rules entitle it to absolute protection against any translator caused interference,^{5/}

^{4/} In an Order ruling on H & B's request for a stay pending judicial review, the Commission stated that it had never applied this policy inflexibly. However, the only example it specified where it would not apply this policy involved the situation where a translator might be deliberately designed to cause interference to a CATV system (A. 74). A limited exception to the Commission's policy to cover willfully caused interference is not sufficient to show any meaningful flexibility on the part of the Commission in applying a policy of not protecting CATV systems against translator caused interference.

^{5/} H & B did point out (A. 6) that Section 74.703(b) of the Commission's Rules prohibits translators from causing adjacent channel interference to off-the-air reception. That Section provides in part as follows:

"Interference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by the translator, regardless of the quality of such reception or the strength of the signal so used. If the interference cannot be promptly eliminated by the application of suitable techniques, operation of the offending translator shall be suspended and shall not be resumed until the interference has been eliminated."

but it did argue that the impairment of service to CATV systems resulting from translator caused interference must be considered and weighed by the Commission against the gains in service to the public in determining whether grant of a translator application would serve the public interest, convenience and necessity (A. 7-8). No - where in the Commission's opinion is such weighing discussed. Later, in ruling on H & B's motion for stay, the Commission stated that its Order granting Booster's application and denying H & B's objections was, in large part, based on a careful weighing of the gains and losses (A. 74), but even in this discussion the Commission mentions only one aspect of the gains, the fact that more people would be served by the translator than are served by the CATV system, and none of the losses that result from grant of Booster's application. Rather than providing a concise statement of the reasons why the gains from the grant of Booster's application outweighed the loss to the public resulting from further impairment of the CATV service H & B offers in Prescott, the Commission brushed off the whole matter by holding that its rules do not provide for protection against translator caused interference.

The Commission's decision can also be interpreted as holding, in the alternative, that H & B did not raise substantial and material questions of fact about whether feasible techniques existed to eliminate translator caused interference from its CATV system.^{6/} If the Commission

^{6/} Counsel for the Appellee apparently believes that the Commission did not reach this question since, in the Commission's view, that is not one of the questions presented for review. See Prehearing Stipulation in this proceeding.

is correct that such techniques do exist, this Court might affirm the Commission even if it disagreed with the Commission about the extent to which the Commission must consider translator caused interference to CATV systems. Despite the fact that the only factual dispute between the parties below was whether the translator caused interference could be eliminated and despite detailed showings by H & B about the efforts it has made to eliminate translator caused interference (A. 11, 12, 31-34, 45-49), the Commission did not indicate what techniques it had in mind for coping with the translator caused interference and whether they were different from the techniques already tried by H & B. It is therefore difficult for this Court to review in any meaningful way the validity of the Commission's determination that techniques do exist to cope with translator caused interference.

A paragraph and a half after the Commission referred to "techniques" to cope with translator caused interference, it also referred to "remedies" and "flexibility" that enable the CATV system to protect itself against interference at its head end by, for example, relocating its head end or utilizing microwave relay stations to bring the signals of the Phoenix television stations to Prescott (A. 55). It is not clear whether the "techniques" first alluded to by the Commission included the "remedies" and "flexibility" subsequently specified. The difference in language and the separation of the discussion indicate that these were not the "techniques" referred to by the Commission, but there is no indication what significance,

if any, the Commission placed on the "remedies" and "flexibility" allegedly available to the CATV system. Again, this makes meaningful judicial review of the Commission's decision difficult.

Section 309(d)(2) of the Communications Act, 47 U.S.C.

§309(d)(2), provides in part as follows:

"If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition."

The Commission's Memorandum Opinion and Order under review in this proceeding does not meet this standard. The Commission merely held that its rules do not protect CATV systems against translator caused interference. If it then proceeded to weigh the gains in service resulting from grant of Booster's application against the losses caused by impairment of CATV reception in Prescott, the reasons for concluding that the gains outweigh the losses are not set forth. Nor does the Commission specify why it concluded that techniques exist to cope with translator caused interference or what these techniques were. As this Court stated in another proceeding, "The Commission's memorandum is merely a collection of conclusory comments; it may be concise, but it certainly does not dispose of the issues raised by West Michigan's pleadings." West Michigan Telecasters, Inc. v. Federal Communications Commission, ___ App. D. C. ___, 396 F. 2d. 688 at p. 691 (1968). On

this ground alone, this proceeding should be remanded to the Commission. See also, e.g., Johnstown Broadcasting Co. v. Federal Communications Commission, 85 App. D. C. 40, 175 F. 2d. 351 (1951).

II. THE COMMISSION APPLIED AN INCORRECT STANDARD IN GRANTING WITHOUT HEARING OVER THE OBJECTIONS OF APPELLANT AN APPLICATION FOR A NEW VHF TRANSLATOR IN PRESCOTT, ARIZONA WHEN IT FAILED TO WEIGH AGAINST THE GAIN IN SERVICE TO THE PUBLIC THAT WOULD RESULT FROM THE OPERATION OF A FIFTH VHF TRANSLATOR IN PRESCOTT THE IMPAIRMENT OF TELEVISION SERVICE THAT WOULD RESULT TO MEMBERS OF THE PUBLIC SUBSCRIBING TO APPELLANT'S CATV SERVICE AND WHEN IT FAILED TO CONSIDER THE POSSIBILITY THAT THE PROPOSED TRANSLATOR COULD BE OPERATED ON A UHF CHANNEL WHERE NO INTERFERENCE TO CATV RECEPTION WOULD BE CAUSED.

Both translators and CATV systems developed in the 1950's to provide television signals to areas where television service was either limited or non-existent. Translators utilize the radio frequency spectrum to rebroadcast on another frequency the signals of incoming stations they receive at choice receiving sites. CATV systems also receive television signals at choice receiving sites, and they distribute those signals to their subscribers by cable.^{7/} Since CATV systems do not utilize the radio frequency spectrum, they were initially not regulated by the Commission. However, in 1965, the Commission adopted rules regulating all CATV systems receiving signals by microwave relay, First Report and Order in Docket Nos. 14895 and 15233, 38 FCC 683 (1965), and in 1966, it adopted

^{7/} Both translators and CATV systems can be authorized to receive their incoming signals by means of microwave relay, but at present neither Booster's translators nor H & B's CATV system does so.

rules regulating all CATV systems. Second Report and Order in Docket Nos. 14895, 15233 and 15971, 2 FCC 2d. 725 (1966). Thus, both translators and CATV systems are now subject to the Commission's regulatory authority.

Since translators utilize the radio frequency spectrum, prior to commencing construction of a translator station, the applicant must obtain authorization to construct its proposed facilities from the Commission. Section 309(a) of the Communications Act, 47 U.S.C. §309(a), provides that the Commission may grant such applications only if it finds that the "public interest, convenience and necessity would be served by the granting thereof" This proceeding was commenced when H & B, pursuant to Section 309(d) of the Communications Act, 47 U.S.C. §309(d), filed a Petition to Deny or Designate for Hearing an application filed by Booster for a new VHF translator station on output Channel 2 in Prescott. H & B showed that its CATV system in Prescott was already subject to extensive interference from translators presently operated by Booster, that it had attempted, without success, to eliminate this interference, that operation by Booster of a Channel 2 translator would increase the interference already received by the CATV system and would impair reception on the only cable channel carrying signals of stations in Phoenix, Arizona that was not already receiving interference from the operation of Booster's existing translators, and that if Booster operated on a UHF channel no additional interference to the CATV system would occur (A. 1-14). H & B therefore argued that, in ruling on Booster's

application, the Commission must consider the effect of its action not only upon translators, but also upon CATV systems, which are regulated as a program distribution service under the same Part of the Commission's Rules as are translators, and that the resulting gains and losses to the public served by facilities in each service must be considered before the Commission can conclude that grant of Booster's application would serve the public interest, convenience and necessity (A. 7-8).

In granting Booster's application for a fifth translator in Prescott over the objections raised by H & B to the additional interference the translator would cause the CATV system's subscribers, the Commission stated (A. 54):

"We have held that, under these circumstances, the CATV system is not entitled to protection against such interference under our rules. Whitesburg Television Translator, Inc. 11 FCC 2d 275, 11 RR 2d 1262."

However, the Whitesburg case, the only authority cited by the Commission, involved not a determination of the extent to which CATV systems are protected under the Commission's rules against translator caused interference, but the very kind of consideration of gains and losses in service to the public that H & B urged the Commission to undertake in this case. In Whitesburg, the CATV system alleged that grant of a translator application would result in adjacent channel interference to reception of one signal carried by the CATV system. There was no allegation that other signals carried by the CATV system were subject to interference from any other source. No show-

ing was made that shielding and filtering techniques would not eliminate adjacent channel interference by the translator. The signal subject to adjacent channel interference was that of an NBC affiliate, and the CATV system carried the signal of a second NBC affiliate, thus insuring that NBC programs would continue to be received interference-free by the CATV subscribers. Finally the grant of the translator application would make available off-the-air, to those not served by the Whitesburg CATV system, the signal of only a second full network-affiliated station. Only after considering all of these factors under the general public interest standard of Section 309(a) of the Communications Act, 47 U.S.C. §309(a), did the Commission grant the application in Whitesburg.

There is no similarity between the situation in Prescott and that in Whitesburg. In Prescott, four signals are already available by VHF translator, including the signals of affiliates of each of the three networks (A. 3), as contrasted with only one translator signal prior to the grant in Whitesburg. Translator operation in Prescott already causes interference to CATV reception on four CATV channels (A. 3-5), while in Whitesburg, there was no indication in the Commission's decision that CATV reception was subject to any other interference. The applicant in Whitesburg did not show that the CATV system could not employ techniques designed to eliminate interference, while a detailed showing was made by H & B that shielding, filtering and other techniques to eliminate translator caused interference had been attempted in Prescott, with unsatisfactory

results (A. 11, 12, 31-34, 46-49). A showing was also made by H & B that operation of a fifth VHF translator on Channel 2 in Prescott would cause interference on cable Channel 2, on which the only NBC affiliate on the system is carried, and would cause increased adjacent channel interference to reception of Station KTVK-TV, the only ABC affiliate carried by the CATV system (A. 13). Nevertheless, without recognizing any differences between the situations in Prescott and Whitesburg, the Commission, on the authority of Whitesburg, held that CATV systems are not entitled to protection against translator caused interference under its rules. If any attempt was made to weigh the gains and losses in television service to the public that would result from grant of Booster's application, the Commission's reasons for determining that the gains resulting from grant of Booster's application outweighed the losses were not set forth.

As part and parcel of its failure to consider gains and losses in service resulting from grant of Booster's application, the Commission also failed to consider a readily available alternative means of authorizing new translator service in Prescott. From the beginning of this proceeding, H & B has made it clear that it would not oppose a UHF translator in Prescott (A. 2). For many years the Commission has been encouraging the development of UHF. In 1962, at the Commission's urging, Congress passed the All Channel Receiver Law, 76 Stat. 150 (1962), 47 U.S.C. §303(s) and 330, requiring that all television sets shipped in interstate

commerce be equipped to receive UHF signals. As a result of passage of that law, since 1964 the American public has been paying more than would otherwise be necessary for its television receivers to cover the additional cost of equipping them to receive UHF signals. In addition, much of the impetus for the Commission's regulation of CATV derives from the Commission's desire to encourage the development of the UHF band. See Second Report and Order in Docket Nos. 14895, 15233 and 15971, 2 FCC 2d 725 (1966), at pp. 769-788. One of the Rules adopted in that proceeding has severely limited the growth of CATV in major television markets by requiring CATV systems, prior to carrying the signals of television stations beyond their service areas in such major television markets, to establish in a hearing that such carriage "would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area." Section 74.1107(a), 47 C.F.R. §74.1107(a). The Commission has further indicated that in hearings conducted pursuant to Section 74.1107, it is particularly interested in the establishment and healthy maintenance of UHF television broadcast service. Second Report and Order in Docket Nos. 14895, 15233 and 15971, supra, at p. 782. Indeed, in defending its jurisdiction to regulate CATV before the courts, the Commission placed major reliance upon the need to regulate CATV in order to foster UHF development, and the Supreme Court accepted the Commission's position on this matter in affirming the Commission's jurisdiction over CATV.

United States et al. v. Southwestern Cable Co. et al., 392 U.S. 157 (1968). See also Buckeye Cablevision, Inc. v. Federal Communications Commission, 128 App. D.C. 262, 387 F.2d 220 (1967). Even in the translator field, the Commission has on several occasions offered VHF translator applicants an opportunity to specify operation on UHF channels when it felt that operation in the VHF band raised public interest problems. See Public Notice dated September 5, 1968 (Broadcast Actions Report No. 7537), in which the Commission stated that it was unable to find that an application for a VHF translator filed by United Artists Broadcasting, Inc. in Mansfield, Ohio, would serve the public interest and provided the applicant an opportunity to dismiss its application or file for a UHF translator within 60 days. See also Public Notice of October 10, 1968 (Broadcast Action Report No. 7615) offering Columbia Broadcasting System, Inc. an opportunity to dismiss its application for a VHF translator in Valparaiso, Indiana and to file a new application for a UHF translator. And in Tri State Television Translators, Inc., 2 FCC 2d 1041 (1965), the Commission designated for hearing applications for seven VHF translators in Cumberland, Maryland in part because of allegations that the grant of the applications would destroy Cumberland as a potential UHF television market.

A major element in the Commission's policy over an extended period of years has therefore been to create conditions that would make use of UHF channels a feasible alternative to operation on VHF channels,

and the Commission's efforts in this field are continuing. On January 31, 1969, the Commission released a Notice of Proposed Rule Making proposing regulations governing tuning methods and controls on television receivers. The proposed regulations would specifically require comparable ease of tuning for the VHF and UHF portions of the receiver.

Notice of Proposed Rule Making in Docket No. 18433, FCC 2d

(FCC 69-88, released January 31, 1969). In the Notice, the Commission indicated that it was encouraged by the progress thus far made by UHF television and reaffirmed its continuing commitment to promote the development of the UHF portion of the television band. It said (§2):

"It should be emphasized, at the outset, that we are generally encouraged by progress which has been made in the development of UHF television broadcasting, and that we look with confidence to its continuing development as a viable and indispensable means of achieving the diversity in television broadcasting which both the Congress and the Commission have considered essential to the public interest."

Indeed, because of the progress UHF has made, the Commission recently proposed to assign a VHF television channel to Mt. Vernon, Illinois despite the fact that on two prior occasions it had declined to do so because of the possible effect on UHF development in the area. Notice of Proposed Rule Making in Docket No. 18453, FCC 2d (FCC 69-147, released February 14, 1969). In making this proposal, the Commission stated (§ 15):

"Circumstances have changed since the previous denials. Congress enacted the all-channel TV receiver legislation, which became effective in May, 1964. The normal replacement rate for TV receivers has been accelerated by the increasing interest in color TV receivers, and receivers with UHF capability will be in most homes in a matter of three or four years. On top of this, public acceptance of an intermixed VHF/UHF television system is growing rapidly and UHF stations in intermixed markets are making significant gains."

In view of these actions to encourage UHF and the Commission's recognition of the success of those actions, some explanation was required from the Commission why, in circumstances such as those in Prescott, where operation of a VHF translator would seriously increase the already significant amount of interference received by a CATV system from translator operation, the public interest did not require, as part of the process of determining whether grant of the application before the Commission without hearing would serve the public interest, some consideration of the alternative of operating the proposed translator on a UHF 8/ channel.

8/ The Commission belatedly addressed itself to the UHF question in its Order ruling on H & B's motion for a stay (A. 74-75), and it rationalized its decision on two grounds. First, it analyzed Booster's financial position and the cost of UHF translator operation and concluded that the cost of UHF translator operation was higher than that of VHF translator operation. While the Commission did not specifically state that Booster could not afford to construct and operate a UHF translator, that was the implication of the Commission's analysis. The trouble with this analysis is that Booster itself never raised the issue of its ability to pay the increased cost of a UHF translator, and H & B therefore never had an opportunity to address itself to this issue. Had Booster raised the issue, H & B would have shown that it has advised Booster that it was (continued on page 30)

This Court, in Interstate Broadcasting Company v. Federal Communications Commission, 116 App. D.C. 327, 323 F.2d 797 (1963), held that, in ruling on broadcast applications, the Commission must, upon an appropriate showing, take into account impairment of broadcast service even in situations where the service impaired is not subject to protection under the Commission's rules. While CATV is not a broadcast service, as long ago as 1955, this Court recognized that CATV systems provide television service to members of the public who are their subscribers and held that such service must be considered as television service by the

8/ willing to negotiate with Booster on the matter of H & B's either defraying or helping to defray the additional costs that would be incurred if Booster were willing to specify operation on a UHF channel and that it received no further communication from Booster on this matter. See Affidavit of Larry T. Brodie, Manager of the Prescott CATV system, attached to H & B's Motion for Stay filed with this Court on March 27, 1969. Second, although the Commission concedes that UHF set penetration figures in Phoenix, the closest market for which figures are available, are very close to the national average, it states that since there is no UHF translator service in Prescott, there has been no special incentive to UHF receiver conversion. The Commission has not explained why it relied, in proposing to assign a VHF channel to Mt. Vernon, Illinois, upon the All Channel Receiver Law to insure virtually complete UHF set conversion within a very few years but was unwilling to place similar reliance on that statute in Prescott.

Commission in acting upon broadcast applications. Clarksburg Publishing Company v. Federal Communications Commission, 96 App. D. C. 211 at p. 217, 225 F.2d 511 at p. 517 (1955). Other cases decided by this Court, such as Democratic Printing Co. v. Federal Communications Commission, 91 App. D. C. 72, 202 F.2d 298 (1952) and Harrell v. Federal Communications Commission, 105 App. D. C. 352, 267 F.2d 629 (1959), make it clear that loss or impairments of service as well as gains must be considered by the Commission in deciding whether to grant broadcast applications, and in Hall v. Federal Communications Commission, 99 App. D. C. 86, 237 F.2d 567 (1956) and Television Corporation of Michigan v. Federal Communications Commission, 111 App. D. C. 101, 294 F.2d 730 (1961), this Court went a step further and made it clear that the Commission's duty on this matter went beyond simply balancing gains and losses and granting applications if the gains were numerically larger than the losses. In Television Corporation of Michigan, supra, this Court stated (294 F.2d at p. 732, 111 U.S. App. D. C. at p. 103):

"It is apparent that the Commission has started with the premise that more service to more people - even to a group already well served - is prima facie desirable, and that it must then consider whether this advantage is offset by the negative factor of loss of service by others. Our Hall opinion expressed the opposite approach - that

deprivation of service to any group was undesirable, and to be justified only by offsetting factors. See 99 U.S. App. D. C. 86 at page 91, 237 F.2d 567, at page 572. The difference is not merely one of words. It is basic to the Commission's approach to its task." (Emphasis supplied).

The Commission's decision in this proceeding ignores these cases. The Commission in effect said that impairment of CATV service is irrelevant when new translator service is involved. Although the Commission did state in its opinion that "[w]e recognize that CATV systems provide a valuable and desired service to members of the public in many areas", it then added "but their service is limited to subscribers who are willing and able to pay a fee, and is not available even at a fee to members of the community in outlying areas." (A.55). The Commission said in effect that impairment of CATV service, which costs money, is of no significance when measured against the gain represented by increased translator service, which is free, regardless of the comparative magnitudes of gain and loss. The gain of a fifth translator service was never weighed against the interest of those members of the public who subscribe to CATV service in being able to receive at least one of the Phoenix signals without interference. ^{9/}

^{9/} In its Order ruling on H & B's motion for a stay, the Commission went so far as to recognize that a CATV system would be entitled to protection from interference from a translator (continued on page 33)

The interests of the CATV system and its subscribers were ignored except for the suggestion that the CATV move its head end or utilize microwave facilities; and this suggestion was made with no regard to whether this would solve interference problems or to the cost of these proposals to the CATV system (and ultimately to its subscribers), and with no consideration the possibility of UHF operation by the translator.

The Commission's treatment of H & B's objections in this proceeding is particularly difficult to understand in light of recent Commission rule making actions in both the translator and CATV fields. In a Report and Order in Docket No. 15971, 13 FCC 2d 305 (1968), in which the Commission's translator rules and policies were extensively reviewed, the Commission stated that the basic function of the translator service is "to make possible the satisfactory reception of television signals in places where they are unavailable

9/ if the translator were deliberately designed to cause interference (A. 74). The cases cited above require more than this. Moreover, while the Commission states in its Order ruling on H & B's request for a stay that it did weigh gains and losses in acting as Booster's application (A. 74), the Commission discusses only the gains and not the losses, thus further compounding its initial failure to follow this Court's mandate, as set forth in Television Corporation of Michigan, supra, that deprivation of service can be justified only by offsetting factors.

by direct reception from stations operating in the regular television broadcast service." 13 FCC2d at p. 306. While the previous translator rules on such matters as ownership of VHF translators, financial support for translators by television licensees, power limitations and the like were somewhat liberalized in that proceeding, the Commission declined to adopt suggestions that translators be permitted to originate program material because "[t]he technical hurdles appear insuperable at this time...."

13 FCC2d at p. 322. With respect to CATV, however, the Commission has recognized a much more extensive role. In its Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397, 15 FCC2d 417 (1968), the Commission quoted from the Report to the Mayor of New York City from the Mayor's Advisory Task Force and Telecommunications, as follows (15 FCC2d at p. 419):

"In conclusion, the promise of cable television remains a glittering one. While progress towards realizing this promise has been slow, there is now an abundance of venture capital ready and able to extend cable television throughout the City. For venture capital sees the possibility of rich rewards. Those who own these electronic circuits will one day be the ones who will bring to the public much of its entertainment and news and information, and will supply the communications links for much of the City's banking, merchandising, and other commercial activities. With a proper master plan these conduits can at the same time be made to serve the City's social, cultural, and educational needs. A master plan can be effective now. It will not be a decade hence if stop-gap expedients prevail."

The Commission then went on to describe in somewhat more detail additional suggested lines of development for CATV. It said (15 FCC2d at pp. 419-421):

"8. It has been suggested that the expanding multi-channel capacity of cable systems could be utilized to provide a variety of new communications services to homes and businesses within a community, in addition to services now commonly offered such as time, weather, news, stock exchange ticker, etc. While we shall not attempt an all-inclusive listing, some of the predicted services include: facsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers, e.g., man to computer communications in the nature of inquiry and response (credit checks, airlines reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and computer to computer communications; the furtherance of various governmental programs on a Federal, State and municipal level, e.g., employment services and manpower utilization, special communications systems to reach particular neighborhoods or ethnic groups within a community, and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution and traffic; various educational and training programs, e.g., job and literacy training, pre-school programs in the nature of 'Project Headstart,' and to enable professional groups such as doctors to keep abreast of developments in their fields; and the provision of a low cost outlet for political candidates, advertisers, amateur expression (e.g. community or university drama groups) and for other moderately funded organizations or persons desiring access to the community or a particular segment of the community.

"9. It has been suggested further that there might be interconnection of local cable systems and the terminal facilities of high capacity terrestrial and/or satellite inter-city systems, to provide numerous communications services to the home, business and educational or other center on a regional or national basis. The advent of CATV program origination in such cities as New York and Los Angeles (where there is also CATV activity) gives rise to the possibility of a CATV origination network or networks. The so-called 'wired city' concept embraces the possibility that television broadcasting might eventually be converted, in whole or in part, to cable transmission (coupled with the use of microwave or other inter-city relay facilities), thereby freeing some broadcast spectrum for other uses and making it technically feasible to have a greater number of national and regional television networks and local outlets. More broadly in the area of general communications, the present and future development of intercity facilities with very high communications capacity (e. g., the L5 coaxial cable, millimeter wave guides, communications by laser beams), coupled with the potential of the computer and communications satellite technologies [footnote omitted], may stimulate the provision of new nationwide or regional services of various kinds, which would require connection to high capacity communications facilities within the locality and from the street to the premises of the consumer. Another matter to be explored in this area is the expanding multi-channel capacity of CATV (together with its proposed auxiliary use of high capacity, local microwave links) [footnote omitted], including the question of whether it is technically and economically feasible for CATV to develop capability for two-way and switched services. "

In light of this potential for future development by CATV, the Commission determined that it had to "come to grips with this dynamic field" if it were to "succeed in its efforts to assure the public of the most efficient and effective nationwide communications service possible." 15 FCC

at p. 417. It therefore instituted a broad ranging inquiry on what regulatory action was called for. 15 FCC 2d at pp. 441-443. It also proposed to require CATV systems to originate significant amounts of local programming as a condition to their right to carry television signals. 15 FCC2d at p. 422. Such recognition of CATV's potential future role in the communications system of this country contrasts sharply with the limited role of translators, and is completely inconsistent with the Commission's cavalier treatment in this proceeding of H & B's efforts to preserve the service it presently offers against further degradation. If the Commission is to regulate the present operations and future development of CATV service, it must regulate fairly and in accordance with the role it envisions for CATV in the communications system of the future. The Commission has not done so in this case. The standard it has applied in deciding this case fails to recognize any legitimate concern on the part of CATV systems for the basic product they sell - good and trouble free television service - and without this service, it is difficult to see how CATV systems can be expected to meet the program origination requirements the Commission is seeking to impose or develop other services of the kind outlined by the Commission.

III. THE COMMISSION ERRED IN CONCLUDING, WITHOUT HOLDING A HEARING, THAT METHODS EXISTED TO ELIMINATE TRANSLATOR-CAUSED INTERFERENCE TO TELEVISION RECEPTION BY CATV SUBSCRIBERS IN PRESCOTT, ARIZONA, AND THAT ACCORDINGLY, NO SUBSTANTIAL OR MATERIAL QUESTIONS OF FACT HAD BEEN RAISED BY THE PLEADINGS BELOW.

In its pleadings before the Commission, H & B showed, without contradiction, that Booster's proposed Channel 2 translator would cause two separate types of interference to television reception by its CATV subscribers in Prescott (A. 5-6, 13). The Commission itself recognized that there is no VHF channel available which Booster can use that will not cause some type of interference to the CATV system (A. 54). In granting Booster's application, however, the Commission stated that there are techniques available to the CATV system to enable it to cope with translator caused interference and that it was incumbent on the CATV system to employ these techniques to the extent necessary to protect itself.

In its pleadings before the Commission, H & B made an extensive showing of the techniques it has employed in an effort to eliminate translator caused interference. In its Petition to Deny or Designate for Hearing, which instituted this proceeding, H & B showed that it attempted to eliminate interference caused by on-channel

radiation by installing Vikoa 448 transformers, which are specifically designed to alleviate strong local interference, to television receivers when it makes house taps (A. 10-11). It attempts to eliminate adjacent channel interference by the use of Jerrold Channel Commanders and a Conrac Demodulator, both of which have good adjacent channel traps, and by installing adjacent channel traps onto its off-the-air antennas (A. 12). In its responsive pleading Booster alleged that interference from on-channel radiation could be eliminated by the use of grounded, shielded wire connected between the individual receiver terminals and the tuner on the individual set (A. 17) and that adjacent channel interference could be eliminated by the use of shielding and trapping techniques (A. 18-19). In reply, H & B made a detailed showing of the extent to which it utilizes shielded cable, its efforts to increase the amount of shielded cable used, and the problems it encountered in attempting to extend the shielded cable directly into the tuners in the sets of its subscribers (A. 31-33). H & B also specified in further detail its use of shielding and trapping techniques in an effort to eliminate adjacent channel interference (A. 33-34). In its reply to the Commission's letter of September 11, 1968, Booster further alleged that the major interference problem faced by H & B could be solved with the installation

of cable and dropped lines which are properly shielded and matched (A. 38, 39-40). In responding to this allegation, H & B showed that it has been converting to the use of back matched taps for the last three years, that in all locations in Prescott where interference from on-channel radiation has been a problem, back matched taps have been used in order to fully match drop lines, and that the drop lines utilized are shielded with copper braid. H & B's Vice-President - Engineering stated, however, that this procedure does not eliminate interference from on-channel radiation (A. 47-48).

The allegations of the parties concerning whether the translator caused interference could be eliminated were therefore squarely in dispute, and this dispute was not resolved by the Commission's unexplained statement that there were techniques available to the CATV system to enable it to cope with the interference. In view of the detailed showing made by H & B of the steps it has taken to eliminate translator caused interference, it was incumbent upon the Commission to either designate Booster's application for hearing to resolve the contested factual issue concerning whether translator caused interference to the CATV system could be eliminated or to specify what techniques other than those attempted by H & B the

Commission had in mind. See, e.g., West Michigan Telecasters, Inc. v. Federal Communications Commission, _____ App. D.C. _____, 396 F.2d 688 (1968); Folkways Broadcasting Co., Inc. v. Federal Communications Commission, 126 App. D.C. 123, 375 F.2d 299 (1967).

After the Commission stated in its opinion that "techniques" existed to cope with the translator caused interference, it also referred to "remedies" and "flexibility" that enable the CATV system to protect itself against interference at its head end by, for example, relocating its head end or utilizing microwave relay stations to bring the signals of the Phoenix stations to Prescott (A. 55). It does not appear that the "techniques" first alluded to by the Commission included the "remedies" and "flexibility" subsequently specified by the Commission for coping with translator caused interference, since the Commission uses different language in describing them and mentions them a paragraph and a half after referring to the unspecified techniques.^{10/} However, even these remedies raise problems. On-channel

^{10/} If the Commission did intend that the CATV system attempt to cope with the translator caused interference by applying those drastic remedies, H & B believes that the Commission should first have considered other alternatives such as requiring the translators to operate on UHF frequencies, and, on the basis of a full factual record, determined which of these alternatives were technically feasible and the benefits and detriments to the public from each alternative.

radiation is caused not at the CATV head end, but in the sets of the CATV system's subscribers (A. 10), and changing the location of the head end or the method by which the CATV system receives its signals would thus have no effect on this kind of interference. Indeed, in other situations, the Commission has itself recognized that there is no ready solution to interference to reception caused by on-channel radiation of local signals in the sets of CATV subscribers. Midwest Television, Inc. (KFMB-TV), 13 FCC 2d 478 (1968) at pp. 508-09; Akron Telerama, Inc. (Initial Decision) _____ FCC 2d _____, 14 Pike & Fischer RR 2d 657 (1968) at pp. 667-68. With respect to adjacent channel interference to off-the-air reception, there is nothing in the record in this proceeding that would indicate that there is another site available where the CATV system could receive the Phoenix signals or that translator caused interference could be eliminated at another site if one could be found. Thus, even if the Commission did intend for the CATV system to attempt such drastic remedies, there still remains a substantial and material question of fact whether those remedies would eliminate translator caused interference and whether the grant of an application that will increase the number of channels subject to such interference will serve the public interest, convenience and necessity.



CONCLUSION

For the foregoing reasons, H & B urges that this Court remand this proceeding to the Commission with instructions to designate Booster's application for hearing to resolve the disputed questions of fact and to weigh, on a full factual record, the gains to the public from the grant of Booster's application against the losses to the public from any resulting impairment in the CATV service offered by H & B in Prescott and to consider as part of this weighing process the availability of UHF channels for translator operation.

Respectfully submitted,

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April 8, 1969

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,685

H & B COMMUNICATIONS CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

PRESCOTT TV BOOSTER CLUB, INC.,
Intervenor

ON APPEAL FROM A MEMORANDUM OPINION AND
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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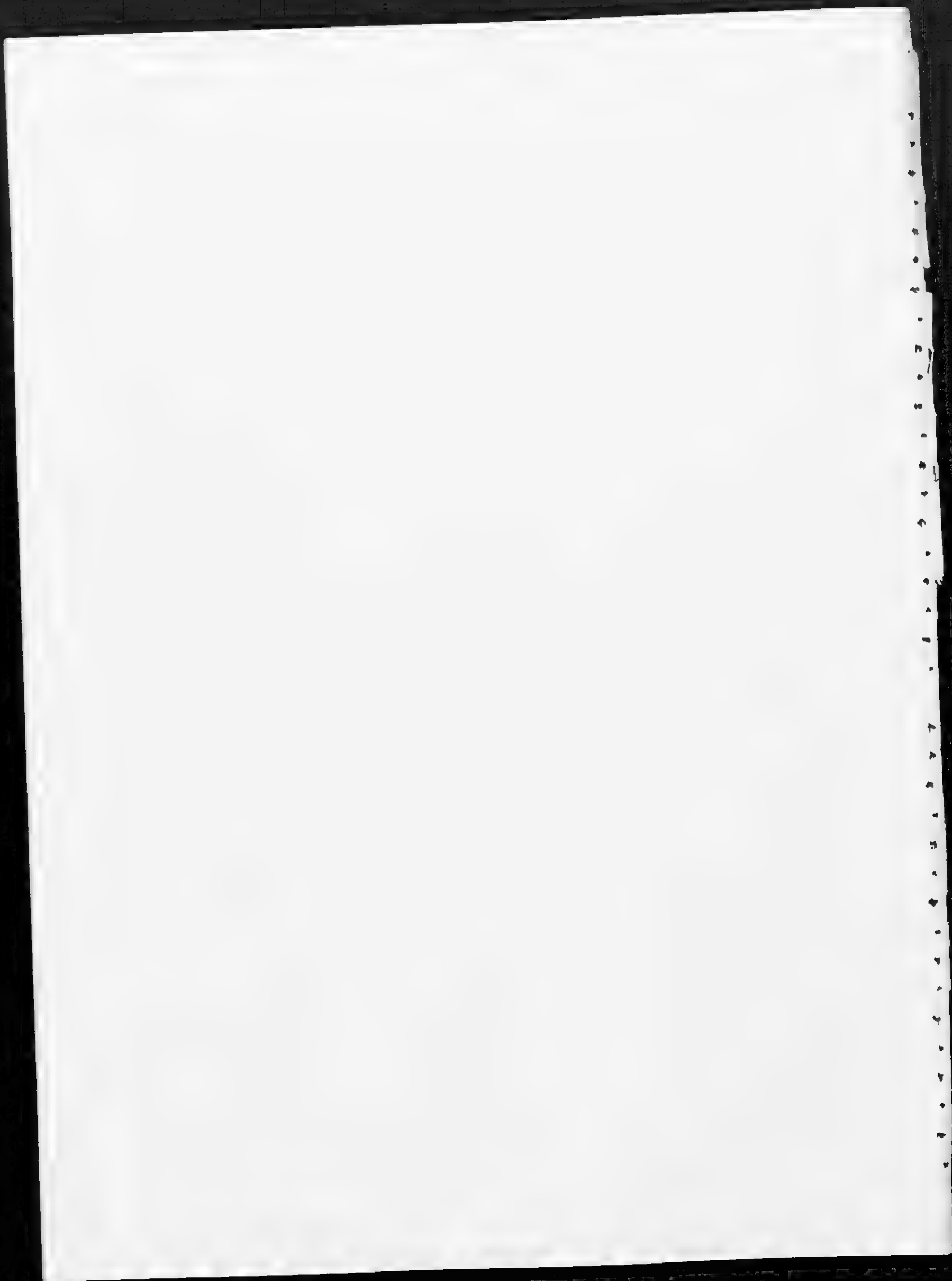


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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,685

H & B COMMUNICATIONS CORPORATION,
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v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

PRESCOTT TV BOOSTER CLUB, INC.,
Intervenor.

ON APPEAL FROM A MEMORANDUM OPINION AND
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

In the Commission's view, this case presents only one issue, namely, whether a CATV system is entitled to protection from translator-caused interference.

This case has not previously been before this Court. A motion seeking a stay of the order under appeal was, however, denied on May 1, 1969.

STATEMENT OF THE CASE

This is an appeal filed pursuant to Section 402(b) (6) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b) (6), from a Memorandum Opinion and Order of the Federal Communications Commission (A. 53-55) released on December 26, 1968, granting the application of Prescott T.V. Booster Club, Inc. (hereinafter Booster) for a permit to construct a new VHF translator station in Prescott, Arizona, which would rebroadcast the signal of educational television station KAET, operating in Phoenix, Arizona. The Commission's Order also denied a petition to deny or designate the Booster application for hearing which petition had been filed by H & B Communications Corporation, the operator of a CATV system in Prescott.

Appellant H & B Communications is the 100% owner of Prescott Cable TV, presently serving 1,925 subscribers in Prescott, Arizona, a community of 12,861 persons.^{1/} For a fee of \$60 a year

^{1/} H & B owns CATV systems in Dothan and Florence, Alabama; Bragg, Lompoc, Sierra Madre, Solvang, Ukiah, Vandenberg A.F.B. and Willits, California; Trinidad, Colorado; Pocatello, Idaho; Dubuque, Iowa; Ft. Kent and Madawaska, Maine; Hamilton, Missoula and Whitefish, Montana; Reno, Nevada; Cape May, Ocean City, Ventnor and Wildwood, New Jersey; Lovington, Portales and Tucumcari, New Mexico; Richland, Walla Walla and Wenatchee, Washington; and Edmundston, N.B., Canada. It owns 81% of systems in Orcutt and Santa Maria, California, and has shares in Jefferson Cablevision which holds franchises in Homewood, Irondale and areas of Jefferson County, Alabama. H & B has outstanding franchises in Atascadero and Santa Ynez Valley, California, Marianna, Florida, and East Dubuque, Illinois. It is owned in part by Video Independent Theatres (RKO General) which in turn owns Vumore Co., another large group owner with seven systems in Arizona where Prescott Cable operates. Television Factbook, Services Volume, 1968-69 Edition, No. 38, pages 345-a, 565-a, and 577-a.

plus \$10 for installation, Prescott Cable picks up off-the-air and delivers by cable to its subscribers the signals of the following five Phoenix, Arizona television stations:

KTAR-TV (NBC), Channel 12 -- on cable Channel 2
KTVK-TV (ABC), Channel 3 -- on cable Channel 3
KOOL-TV (CBS), Channel 10 -- on cable Channel 4
KPHO-TV (Ind.), Channel 5 -- on cable Channel 5
KAET-TV (ETV), Channel 8 (the subject of this appeal)
-- on cable Channel 6

H & B provides a time and weather service on an additional channel, and microwave authorizations have been granted by the Commission which will deliver to the Prescott system the signals of Los Angeles television stations KHJ-TV and KTLA-TV.

Booster is a nonprofit corporation authorized and existing under the laws of the State of Arizona. It obtains its operating funds from voluntary public subscriptions. Its officers and directors serve without compensation. No income accrues to the members of the corporation, and all funds derived from the public subscriptions are used exclusively for current operating expenses and for the purchase of equipment (A. 16).

In December 1967, Booster made application to the Commission for authority to construct a new VHF television

translator station to operate on output Channel 2 in Prescott, Arizona, rebroadcasting the signal of KAET-TV, the educational station which operates on Channel 8 in Phoenix, Arizona. Booster is presently the licensee of four television translator stations which rebroadcast the signals of the following Phoenix stations:

KTAR-TV -- on output Channel 6

KTVK-TV -- on output Channel 7

KOOL-TV -- on output Channel 4

KPHO-TV -- on output Channel 13

The grant of this application thus brings to Prescott and its surrounding area free of charge and off-the-air the same five services as are presently provided by H & B to its subscribers via cable for a fee.^{2/}

The proposed translator will serve an area which includes and extends beyond the city of Prescott, containing approximately 5,000 homes. H & B's service is confined to Prescott and, as indicated above, reaches less than 2,000 homes (A. 22, 23 and 55).

H & B petitioned the Commission to deny or designate Booster's application for hearing, alleging that the translator

^{2/} As indicated above, this parity will not long remain since microwave authorizations have been granted by means of which the cable system will also provide its subscribers with the signals of two independent Los Angeles television stations.

would cause interference to reception by its CATV subscribers on cable Channel 2 and adjacent channel interference on cable Channel 3. It alleged that interference of this kind was already being caused by Booster's existing translators and that a grant of the pending application would aggravate the situation. Since the Booster Club already provides free reception of four Phoenix VHF channels, H & B argued, it should not be permitted to initiate a fifth operation which might cause additional interference to its cable system (A. 1-14).

The Commission was unpersuaded by H & B's arguments. Conceding the facts to be as alleged, the Commission concluded that its rules, as written and as applied, do not entitle CATVs to protection against interference from translators and that the relief requested by H & B was thus unwarranted. The Commission explained that while "CATV systems provide a valuable and desired service to members of the public in many areas . . . their service is limited to subscribers who are willing and able to pay a fee, and usually is not available even at a fee to members of the community in outlying areas" (A. 55). Thus, in this case, illustrated the Commission, the cable system serves approximately 2,000 homes while the translator would serve approximately 5,000 homes. Moreover, to the extent that circumstances exist which are detrimental to

reception, the CATV system, unlike the translator's viewers, is in a position to take certain corrective measures, such as relocating its receiving antenna or using microwave more extensively. Because of these factors and since "the cable system has operated, apparently successfully, in spite of the interference which it states exists because of the translators" (A. 55), the Commission found that, no material or substantial questions of fact having been raised, a grant of the Booster application would serve the public interest, convenience and necessity (A. 53-55).

After filing its appeal, H & B petitioned the Commission for a stay of Booster's grant on the ground that there was a likelihood of its succeeding in Court on the merits of its case (A. 56-72). Its chief contention was that the Commission's action should be set aside because it had failed to fully protect one auxiliary broadcast service against interference by another. In rejecting this argument, the Commission again emphasized that "CATV is not a broadcast service and because its service is limited to private parties who have entered into contractual obligations for its service, it stands in a different posture than off-the-air broadcast service such as a translator provides," citing Community Television, Inc. v. U.S.A. and F.C.C., 404 F.2d 771 (10th Cir., 1969), (A. 74).

H & B's further allegation that the Commission had failed to consider gains and losses of service in arriving at its decision was likewise found to be factually erroneous, the Commission noting for example its specific recitation of the fact that far more people would be served by the translator than by the CATV system. Finally, in answer to the contention that the Booster Club should be forced to construct a UHF rather than a VHF translator, the Commission noted that the feasibility of the proposed VHF translator was established while various problems of construction (UHF translators are significantly more costly to construct) and reception (only about 59% of the homes in the Phoenix market are presently capable of receiving UHF service) rendered a UHF operation both less likely of effectuation and less effective in operation.

In light of the foregoing, the Commission determined that a grant of the requested stay would not serve the public interest. It did, however, grant H & B's motion to the extent of staying its action until this Court acts upon H & B's request for a stay pendente lite (A. 73-75). On May 1, 1969, H & B's motion for a stay was denied.

ARGUMENT

- I. IT WAS WELL WITHIN THE COMMISSION'S DISCRETION TO AUTHORIZE A TRANSLATOR STATION IN PRESCOTT TO REBROADCAST THE PROGRAMS OF AN EDUCATIONAL STATION IN PHOENIX OVER THE OBJECTION OF A CATV SYSTEM THAT THE PICTURE QUALITY ON TWO OF ITS CHANNELS WOULD BE ADVERSELY AFFECTED.

In our view there is only one issue in this proceeding, namely, whether it was within the Commission's discretion to grant a construction permit to Booster for a new translator station which would bring to the residents of Prescott, Arizona, off-the-air and free of charge on output Channel 2 the signal of the educational television station in Phoenix, Arizona, notwithstanding the fact that this proposed translator would cause a certain amount of interference to reception by the CATV systems' subscribers on cable Channels 2 and 3. In considering the Commission's action it should be borne in mind preliminarily that Booster has for some years been operating four VHF translators in Prescott simultaneously with H & B's five channel cable operation. Although H & B alleges that these translators have always caused interference to reception by its subscribers, H & B has managed to build a clientele of approximately 2,000 persons and to co-exist with the translators by using various engineering techniques to minimize the interference.^{3/}

^{3/} The interference involving the four existing translators and the cable system is, of course, not in issue here.

This appeal simply concerns Booster's effort to construct a fifth translator station which would bring to the residents of Prescott and its surrounding areas the signal of the Phoenix educational station. H & B claims that this proposed translator operation will aggravate the presently existing situation.^{4/} It has never claimed, however, that its service is unsatisfactory, that any subscribers have been lost as a result of the existing interference, or even that there is significant customer dissatisfaction.

H & B's main argument is that since CATV systems are now subject to the Commission's regulatory authority "as a program distribution service under the same Part of the Commission's Rules as are translators" (Br. 23), the Commission must weigh the gains and losses to the public served by each service before it can conclude that a grant of Booster's translator application would serve the public interest, convenience, and necessity. Our answer to this contention is twofold. First, the Commission's rules prohibiting translator-caused interference do not protect CATV systems from such interference. 47 CFR 74.702, 74.703. Second,

^{4/} Specifically, H & B contends that some of its subscribers will receive interference on Channel 2 that will affect the quality of their picture and that interference at the site of the system's receiving antenna will impair reception on Channel 3. The latter interference occurs only sporadically (two days per month) and the former exists only at certain locations affecting about 40% of the system's subscribers (R. 3-4).

the Commission's decision was nonetheless based on a careful weighing of the gains and losses which would result from the proposed translator operation. Since the grant was found to be in the public interest, there is no merit to H & B's final claim that a hearing should have been held to determine whether steps could be taken to eliminate or minimize the interference the translator may cause.

A. The Commission's Rules Prohibiting Translator-Caused Interference Do Not Protect CATV Systems From Such Interference.

This Court has on a number of occasions in the recent past considered cases involving community antenna television systems (CATVs) as well as cases concerning television broadcast translator stations. See, e.g., Buckeye Cablevision, Inc. v. F.C.C., 128 U.S. App. D.C. 262, 387 F.2d 220 (1967); Carter Mountain Transmission Corp. v. F.C.C., 116 U.S. App. D.C. 93, 321 F.2d 359 (1963), cert. denied 375 U.S. 951; and Frontier Broadcasting Company v. F.C.C., ___ U.S. App. D.C. ___, ___ F.2d ___, decided February 26, 1969; see also Community Television, Inc. v. U.S.A., 404 F.2d 771 (10th Cir., 1969). We will therefore not burden the Court with a repetition of the nature and genesis of these services. We merely stress that although CATVs and translators are each intended to supplement regular television broadcasting, they are in essence different kinds of services.

Translators are broadcast stations.^{5/} They receive television signals off-the-air, convert or "translate" them to another television channel, then amplify and retransmit them so as to provide acceptable reception to the general public in small communities where direct reception of the signals of the original television broadcast station is unsatisfactory. Since translator stations do not by their own operation generate any revenue, they are often built and operated by nonprofit corporations or associations such as Booster, which secure funds by public contributions or subscriptions. Their cost of construction and maintenance is small. In contrast to CATV, there is no charge for translator service since it can be picked up off-the-air.^{6/}

CATV systems on the other hand are business enterprises conducted for profit. By the use of powerful and sophisticated equipment they provide improved picture quality and make it possible for

^{5/} Section 3(o) of the Communications Act, 47 U.S.C. 153(o), defines broadcasting as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."

^{6/} See Section 74.731 of the Commission's Rules, 47 CFR 74.731; Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry (1965); CATV and TV Repeater Services, 26 F.C.C. 403 (1959); and Cox, The Television Inquiry, The Problem of Television Service For Smaller Communities, Staff Report prepared for the Committee on Interstate and Foreign Commerce, United States Senate, 85th Cong., 2d Sess., (1959).

subscribers to receive signals which are either unavailable or only marginally viewable off-the-air. However, their service is not ordinarily offered to rural, sparsely-populated areas and is furnished only to those members of the public who have contracted for it by paying installation charges and a regular monthly fee.

Section 74.703(a) of the Commission's Rules, 47 CFR 74.703(a), provides in pertinent part that "[a]n application for a new television broadcast translator station . . . will not be granted where it is apparent that interference will be caused," that is, where "reception of a regularly used signal is impaired" (§74.703(b)).^{7/} The Commission has consistently construed this rule as applying only to interference with off-the-air reception by members of the viewing public and not as a measure of protection for CATV systems against translators: "A CATV system operator is not a viewer in the ordinary sense, since such facility, while receiving the signals in many cases directly off the air, does so for the purpose of distributing such signals to others for a fee, rather than for its individual viewing. In addition, unlike the individual viewer, the CATV system operator, because of the nature of the operation, has remedies available to him to avoid or reduce

^{7/} The full text of Section 74.703 is appended hereto.

interference which are unavailable to the individual viewer.

In view of this flexibility, the application of a rigid 'no interference' rule to this kind of situation, protecting the reception of distant television broadcast stations by CATV operators to the detriment of direct reception of VHF translator signals by the general public would be wholly inappropriate."

Claremont Television, Inc., 24 Pike and Fischer, R.R. 805, 810-811

(1963). See also Tele-Ray Translator System, 2 Pike & Fischer,

R.R. 2d 678 (1964); Whitesburg Television Translator, Inc., 11 F.C.C.

2d 275 (1968); Show Low Area TV Service, 15 F.C.C. 2d 1000 (1969).

H & B apparently agrees that this is a reasonable construction, acknowledging (Br. p. 17) that it did not argue below that it was entitled to protection under the terms of the rule.

The Commission's refusal to afford CATV systems the type of protection here sought is not only consistent with the provisions and with the intention of the applicable rules, but is also dictated by the Commission's statutory mandate to make communications services available "to all the people."^{8/} Historically, therefore, the Commission has sought actively to promote the use of translators and has made clear that where a conflict with CATV

^{8/} 47 U.S.C. 151; see also 47 U.S.C. 303(g), 307(b).

arises, the former has priority:

We recognize that during these formative years in the development of television service, community antennas, although not established under Commission authorization, have contributed significantly in providing television reception to isolated areas without service from regular stations. But community antennas do not provide a broadcast service available to the public at large. Their service is limited to subscribers who must pay a fee, and often is not available even at a fee for those members of the community in outlying areas. The Commission, under the Communications Act is obligated to provide a fair and equitable distribution of television service. We would not be warranted in withholding the authorization of translators, designed to provide television to isolated communities, merely because they would compete with community antennas providing service to some people at a fee. Investments in community antennas were not made on the basis of any assurance that the areas served by them would remain without direct television reception. Such systems have been interim measures, taken without Commission authorization, to provide outlying areas with television until direct reception could be achieved. The public interest would not be served by depriving a community of the privilege of obtaining direct television reception to protect these investments. Amendment of the Commission's Rules and Regulations to Permit the Operation of TV Translator Stations in Conjunction with the Primary Transmitter, 13 Pike and Fischer, R.R. 1561, 1564 (1956).

H & B claims, however, that the Commission's recent recognition of CATV's potential role in the communications system of this country contrasts sharply with the still limited role of

translators and is, therefore, completely inconsistent with the Commission's "cavalier treatment in this proceeding of H & B's efforts to preserve the service it presently offers against further degradation" (Br. 37). Contrary to this contention, the fact is that the Commission has recognized a continuing need for television translators. For example, in 1967, the Commission inaugurated a broad review of its rules governing television translators. In 1968, aided by comments filed by over sixty parties, it adopted a Report and Order amending these rules.^{9/} In the course of this proceeding, the Commission gave consideration to the similarities and distinctions between translators and CATVs, both of which are intended to supplement without displacing or unduly burdening the regular television broadcast service. While it recognized the bearing on the translator service of the rapidly evolving CATV industry and vice versa, it did not amend such rules as Section 74.703 quoted above. Instead, the Commission indicated that it would continue to observe developments with a view to such possible future changes as evolving conditions in CATV might ultimately show to be desirable.

9/ Report and Order Amending Rules Governing Television Broadcast Translator Stations, 13 F.C.C. 2d 305 (1968).

H & B argues that the time has already arrived, indicating that the importance of the role the Commission itself projects for CATV in the future is inconsistent with the subordinate position the CATV has been assigned in the decision on appeal. However, those portions of the Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397, 15 F.C.C. 2d 417 (1968), which are relied on in H & B's brief (Br. 34-37), involve not Commission findings but a description of the long range potential foreseen by CATV advocates. There is no suggestion in the record below that commencement of the services described in these paragraphs is imminent in Prescott, Arizona. Likewise, there is no evidence that the existence of the proposed translator would place the CATV in jeopardy over the long run or inhibit the development of these services when they become feasible. It is entirely possible that in many areas where they now exist, the time will come when television translators will no longer be needed. But for the foreseeable future, if the general public in Prescott is to receive television programming without paying subscription fees such as those charged by H & B, it will be largely by means of translators, including the one at issue here.

B. The Commission's Decision Was Based On A
Careful Weighing Of All The Pertinent Factors.

Conceding that it is not entitled to "absolute" protection against translator-caused interference, H & B nonetheless argues that impairment of service to its CATV system should have been considered and weighed by the Commission against the gains in service which would result from a grant of the translator application (Br. 17-18). But the Commission did weigh these gains and losses and concluded on balance in favor of the public's receipt for the first time, off-the-air and free of charge by means of this nonprofit community organization's translator facility, of the signal of the Phoenix non-commercial educational television station (A. 55). Specifically, it stated, "We recognize that CATV systems provide a valuable and desired service to members of the public in many areas, but their service is limited to subscribers who are willing and able to pay a fee, and usually is not available even at a fee to members of the community in outlying areas. Thus, the cable system serves approximately 2,000 homes; the translator would serve approximately 5,000 homes" (A. 55). By means of the grant of this fifth translator station to Booster, the Commission has achieved a result consistent with its small market policy of supplying inadequately served areas with the signals of all three networks, an independent station, and an educational station. See paragraph 57, Proposed Amendments to CATV Rules, 15 F.C.C. 2d 417, 440 (1968).

H & B insists that as part of this weighing process, the Commission should have considered readily available alternative means of authorizing new translator service in Prescott, namely, use of a UHF rather than a VHF translator (Br. 25-29).^{10/} This argument is difficult to understand since, when raised, the Commission did give careful consideration to this possibility. It concluded, however, that (A. 74-75):

As to the feasibility of a UHF translator, we cannot conclude that it would be appropriate to require this applicant to shift to a UHF frequency. The applicant is a non-profit community-type organization, wholly dependent upon voluntary contributions from members of the public for its support, whose financial base is not assured and, as a community-sponsored organization, who is responsible to its supporters for the preservation of its assets. The service it proposes to bring to Prescott is that of a non-commercial educational television station, an objective clearly consistent with the public interest. The applicant exists by virtue of the demands of the community for the off-the-air broadcast service it provides. With these facts in mind, we have examined the applicant's financial position. The applicant presently operates four VHF translators in Prescott (KØ4AI, KØ6AE, KØ7AP, and K13FY), the operating and maintenance costs of which are met by voluntary contributions. The applicant estimated that construction costs for its fifth translator would be approximately \$1,400 plus \$600 for expenses in its first year. Its income consists of subscriptions of \$1.00 per family per month and, in the nine months ending September 30, 1967, it realized \$7,090 from this source. Obviously, it has the resources to construct and operate an individual VHF translator.

^{10/} It is noted that H & B did not raise this UHF-feasibility question directly in its petition to deny but merely mentioned, incidentally, that "UHF channels are available for translator use" (see A. 7). For this reason, the Commission addressed itself to this matter only when it was directly raised for the first time by H & B in support of its motion to the Commission seeking a stay of Booster's grant pending judicial determination of the merits of this appeal.

A UHF translator station, completely installed and ready for operation, costs between \$10,000 and \$15,000 and, depending upon a variety of factors, may go as high as \$25,000, but seldom lower than \$8,000. */ The costs of operation of a UHF translator are proportionately higher than for a VHF translator. Moreover, since no UHF television station or UHF translator provides service to Prescott, there has been no special incentive to UHF receiver conversion. American Research Bureau (ARB), which publishes data on the extent of UHF receiver set conversion, has furnished no figures for the Prescott area, but its data on the closest market (Phoenix) indicates that, as of November, 1968, UHF receiver set saturation was about 59%, very close to the national average. Under the circumstances of this case, we did not believe it appropriate to suggest a UHF frequency as a reasonable alternative.

*/ Based on information from the Commission's public files.

At footnote 8, pages 29-30 of its brief, H & B attempts to answer the Commission's above-quoted judgment that Booster could not afford to construct and operate a UHF translator by pointing to the fact that it had allegedly advised Booster that it "was willing to negotiate . . . on the matter of H & B's either defraying or helping to defray the additional costs that would be incurred" if Booster were willing to specify operation on a UHF channel. This matter, never before made known to the Commission, is, of course, barred as a subject for this Court's consideration by Section 405 of the Communication's Act, 47 U.S.C. 405.^{11/} Additionally, however,

^{11/} See Hansen v. F.C.C., ___ U.S. App. D.C. ___, ___ F.2d ___, decided April 17, 1969; Albertson v. F.C.C., 100 U.S. App. D.C. 103, 243 F.2d 209 (1957); Unemployment Comp. Comm'n v. Aragon, 327 U.S. 143 (1946).

H & B's so-called offer is so indefinite as to be entitled to no weight even if considered.

Finally, in regard to this matter of alternative UHF operation, H & B correctly notes (Br. 27) that the Commission has on occasion offered VHF translator applicants an opportunity to specify operation on UHF channels when it felt that operation in the VHF band raised public interest problems. The broadcast actions it cites, however,^{12/} point up the difference between those cases and the situation here. Each turned on the impact which a grant of the VHF translator application would have on the ability of a UHF station in the area to develop and compete successfully. Here, there is no UHF station. The only complainant is a CATV system, entitled to no protection, whose service it must be remembered is confined to the areas of the city which are wired for cable service. Prescott has no local television station. And only by means of Booster's translator can the residents of the rural areas surrounding Prescott, as well as the residents of Prescott who are financially unable or simply do not choose to subscribe to cable service, able to receive free, off-the-air, the signal of the Phoenix non-commercial educational station, "an objective clearly consistent with the public interest" (A. 74).

^{12/} Public Notice dated September 5, 1968, Broadcast Actions Report No. 7537, re United Artists Broadcasting, Inc.; Broadcast Actions Report No. 7615, re Columbia Broadcasting System, Inc.

C. There Is No Need For A Hearing To Determine Whether The CATV System Can Feasibly Minimize Or Eliminate The Interference.

Although the Commission does not require translators to protect CATV systems against interference from their operation, it has "never applied this policy inflexibly and . . . [h]as recognized that conditions may exist where the policy would be inappropriate" (A. 74). The Commission has on numerous occasions expressed its desire where possible to avoid such interference and has consistently urged cooperation between translators and CATV systems to enable them to exist harmoniously. See Tri-State Television Translator, Inc., 9 F.C.C. 2d 764 (1967); Whitesburg Television Translator, Inc., supra; Show-Low TV Service, supra. It followed this very course here, directing a letter to Booster in which it noted H & B's complaint and stated (A. 36):

Although the Commission's Rules do not require that the reception of a CATV system's signals by its subscribers be protected against interference by a broadcast station, elimination of such interference would be desirable.

The Commission then posed the question as to whether operation of the proposed translator on output Channel 9 or 11 instead of output Channel 2 would not be more in the public interest. After consideration of Booster's reply, supported by an engineering affidavit (A. 37-40), as well as an answering statement filed by

H & B (A. 41-50) which agreed that operation of the translator on Channels 9 or 11 would not be feasible, the Commission concluded that "there is no VHF channel available which the translator can use without causing some type of interference to the cable system" and thus none which "would not meet with similar objections" from H & B (A. 54).

At this point in its opinion, the Commission made the general observation that there are techniques available to the CATV system with which it may cope with this interference problem and concluded that it was incumbent upon the system to employ these techniques to the extent necessary to protect itself (A. 55). H & B argues, however, that the allegations of the parties concerning whether the translator-caused interference can be eliminated are squarely in dispute and, therefore, that it was incumbent upon the Commission either to designate Booster's application for hearing to resolve this contested factual issue or to specify what techniques other than those attempted by H & B the Commission had in mind (Br. 40-41). In regard to H & B's request for a hearing, we ^{13/} merely point out that under the terms of the Communications Act

^{13/} See Sections 309(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d)(2).

no hearing is required, unless there is an unresolved "substantial and material" question of fact. But whether there are effective techniques by which H & B may eliminate interference to its CATV system is not material since, as we have shown, CATV is in any event not entitled to protection from such interference under the applicable rules and licensing policies. Thus, as is apparent from a reading of the Tri-State, Whitesburg, and Show-Low cases cited above, the Commission's discussion in its order here under review concerning possible remedial measures was hortatory, rather than a decisional consideration, representing an effort by the agency to mitigate the effect of the decision, if possible.

Finally, it must be borne in mind that "the cable system has operated, apparently successfully, in spite of the interference which it states exists because of the translators" (A. 55). There is no reason to believe that it cannot continue to do so or that the Commission's consideration of this matter was in any way "cavalier." Rather, we submit, it acted in an extremely reasonable fashion, at all times giving careful consideration and searching for a solution to H & B's complaints.

CONCLUSION

For all of the foregoing reasons, the Commission's grant to Booster of a permit to construct a translator station which will bring to the residents of Prescott, Arizona, and its surrounding areas for the first time off-the-air and free of charge the signal of the Phoenix educational television station, should be affirmed.

Respectfully submitted,

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Federal Communications Commission
Washington, D. C. 20554

May 8, 1969.

APPENDIX

Section 74.703, 47 CFR 74.703:

§74.703 Interference.

(a) An application for a new television broadcast translator station or for changes in the facilities of an authorized station will not be granted where it is apparent that interference will be caused. In general, the licensee of a new UHF translator shall protect existing UHF translators from interference resulting from its operation. If interference develops between VHF translators, the problem shall be resolved by mutual agreement among the licensees involved.

(b) It shall be the responsibility of the licensee of a VHF translator to correct at its expense any condition of interference to the direct reception of the signals of a television broadcast station operating on the same channel as that used by the VHF translator or on an adjacent channel, which occurs as the result of the operation of the translator. Interference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by the translator, regardless of the quality of such reception or the strength of the signal so used. If the interference cannot be promptly eliminated by the application of suitable techniques, operation of the offending translator shall be suspended and shall not be resumed until the interference has been eliminated. If the complainant refuses to permit the translator licensee to apply remedial techniques which demonstrably will eliminate the interference without impairment of the original reception, the licensee of the translator is absolved of further responsibility.

(c) It shall be the responsibility of the licensee of a television broadcast translator station to correct any condition of interference which results from the radiation of radio frequency energy by its equipment on any frequency outside the assigned channel. Upon notice by the Commission to the station licensee or operator that such interference is being caused, the operation of the television broadcast translator station shall be suspended immediately and shall not be resumed until the interference has been eliminated or it can be demonstrated that the interference is not due to spurious emissions by the television broadcast translator station: *Provided, however,* That short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures.

(d) In each instance where suspension of operation is required, the licensee shall submit a full report to the Commission after operation is resumed, containing details of the nature of the interference, the source of the interfering signals, and the remedial steps taken to eliminate the interference.

REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

CASE NO. 22,685

FILED MAY 22 1969

Nathan J. Paulson
CLERK

H & B COMMUNICATIONS CORPORATION,
Appellant,

V.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

PRESCOTT TV BOOSTER CLUB, INC.,
Intervenor,

ON APPEAL FROM A MEMORANDUM
OPINION AND ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22, 685

H & B COMMUNICATIONS CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

PRESCOTT TV BOOSTER CLUB, INC.,
Intervenor.

ON APPEAL FROM A MEMORANDUM OPINION AND
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR APPELLANT

INTRODUCTION

This Reply Brief is being filed by Appellant H & B Communications Corporation (H & B) in response to the Brief filed by the Appellee Federal Communications Commission (the Commission) on May 8, 1969. The Commission's Brief makes it clear that there is

no dispute on the facts concerning translator caused interference to CATV subscribers in Prescott, Arizona. ^{1/} H & B's Brief has made it clear that the argument made by the Commission at pp. 10-16 of its Brief--that the Commission's rules prohibiting translator caused interference do not give any absolute protection to CATV systems against such interference--also is not in dispute. ^{2/} H & B has not relied either before the Commission or this Court on Section 74.703, 47 U. S. C. §74.703, rule cited by the Commission and printed as an Appendix to its Brief. The Commission's Brief further narrows the issues in this proceeding in the two following respects.

First, the Commission's Brief has eliminated the need for any further discussion of the Argument made by H & B at pp. 38 to 43

^{1/} See Brief for Appellee, p. 5. However, in footnote 1 of its Brief, the Commission sets forth erroneous and out of date information derived from trade press sources about the ownership of H & B and the other CATV systems it owns. At present and at all times relevant to this proceeding, Video Independent Theaters (RKO General) had no ownership interest in H & B. Complete and accurate information about H & B's ownership is available in the Commission's ownership files for Station KNEZ, Lompoc, California, an AM station licensed to H & B and serving a small California community. Similarly, the list of CATV systems owned by H & B contains both errors of inclusion and omission. Since considerations of multiple ownership of CATV systems bear no conceivable relationship to the simple interference questions raised by this Appeal and no reliance was placed on considerations of this kind by the Commission in ruling on the merits of H & B's objections, H & B is not attempting to supplement the record at this late date to correct the errors in the Commission's footnote.

^{2/} See Brief for Appellant, pp. 17-18.

of its Brief that substantial and material questions of fact had been raised by H & B concerning whether translator caused interference can be eliminated from the Prescott CATV system. The Commission concedes that the discussion in its Memorandum Opinion and Order concerning the availability of techniques to cope with such interference was a "general observation"^{3/} that was merely "hortatory."^{4/} It is thus clear that this Court cannot affirm the Commission's action in this proceeding on the alternative ground that H & B failed to raise substantial and material questions of fact about whether techniques exist that enable the CATV system to cope with translator caused interference. A "general observation" or "hortatory" statement on these matters does not constitute the kind of consideration required by Section 309(d)(2) of the Communications Act, 47 U.S.C. 309(d)(2), in ruling on H & B's specific and detailed showing concerning its unsuccessful efforts to eliminate translator caused interference.

Second, and most important, the Commission appears to have conceded H & B's principal point--that even though the Commission's rules do not provide absolute protection to CATV systems against translator caused interference, such interference must be considered

^{3/} Brief for Appellee, p. 22.

^{4/} Brief for Appellee, 23.

and the losses caused by such interference weighed against the gains in television service resulting from the grant of a translator application. There is no other explanation for the failure of the Commission in its Brief to even discuss cases principally relied on by H & B such as Interstate Broadcasting Company v. Federal Communications Commission, 116 App. D.C. 327, 323 F.2d 797 (1963), Hall v. Federal Communications Commission, 99 App. D.C. 86, 237 F.2d 567 (1956), and Television Corporation of Michigan v. Federal Communications Commission, 111 App. D.C. 101, 294 F.2d 730 (1961). Indeed, the discussion at pp. 17-20 of the Commission's Brief argues that the Commission did weigh the gains and losses and seeks affirmance on this ground.

The only matters remaining seriously in dispute, therefore, are the extent to which the Commission gave consideration to the losses in television service to CATV subscribers and whether the Commission, in weighing the gains that would follow from grant of Booster's application against the losses that would also result, was required to consider as part of the weighing process the alternative available to Booster of operating its translator on a UHF channel.^{5/} Each of these matters will

^{5/} If the Commission did adequately consider these matters, the question remains whether its Memorandum Opinion and Order sets forth a concise statement of the basis for its action.

be discussed in the sections that follow.

THERE IS NO INDICATION IN THE COMMISSION'S
MEMORANDUM OPINION AND ORDER THAT ANY
WEIGHING OF LOSSES AGAINST GAINS WAS UNDERTAKEN

While the Commission's Brief attempts to convey the impression that the Commission carefully weighed gains and losses,^{6/} no such weighing process can be discerned in the Commission's Memorandum Opinion and Order. The Commission's entire statement on the matter of either gains or losses is as follows:

"We recognize that CATV systems provide a valuable and desired service to members of the public in many areas, but their service is limited to subscribers who are willing and able to pay a fee, and usually is not available even at a fee to members of the community in outlying areas. Thus, the cable system serves approximately 2,000 homes; the translator would service approximately 5,000 homes." (A. 55)

Nor was any further explanation provided by the Commission in its Order ruling on H & B's request for a stay. The Commission merely added (A. 74), "We concluded that, on balance, the gains outweighed the losses."

The nature of the consideration given by the Commission to

^{6/} Brief for Appellee, pp. 5-7, 17.

the losses was not meaningful. The Commission initially dismissed these losses with the statement that its rules do not protect CATV systems against translator caused interference (A. 54). At page 23 of its Brief, the Commission takes the position that because of this determination, H & B's argument concerning whether it can eliminate translator caused interference is "immaterial" and the Commission's further discussion of that matter was "hortatory." Apparently the losses were for the same reason considered immaterial for the purposes of weighing them against the gains resulting from grant of Booster's application, since those losses were never again mentioned by the Commission.

In support of its Argument that the Commission did weigh gains and losses, the Commission also argues ^{7/} that CATV subscribers must pay for the service they receive, while translator service is available without charge to those who do not voluntarily contribute to the costs of constructing and maintaining the translators. ^{8/} The

^{7/} Brief for Appellee, p. 17., A. 55, A. 70.

^{8/} Translator service in Prescott is "free" only in that persons who do not choose to contribute to Booster can still receive the signals of its translators.

purport of this argument is that impairments in a service for which a fee is charged need not be considered by the Commission. However, this Court long ago recognized that CATV systems provide television service to the public, Clarksburg Publishing Co. v. Federal Communications Commission, 96 App. D. C. 211, 225 F.2d 511 (1955), and that such service must be considered by the Commission in acting on broadcast applications. Indeed, in the Commission's Memorandum on Its Jurisdiction and Authority, which provided the legal basis for the Commission's assertion of authority to regulate CATV systems, the Commission itself relied on the Clarksburg case to support the proposition that CATV systems are extensions of the interstate service of the television stations whose signals they carry. See Second Report and Order in Docket Nos. 18495, 15233 and 15971, Appendix C, 2 FCC 2d 725, at pp. 793-94. The Commission cannot now have it both ways. If the television service CATV systems provide renders them subject to the Commission's jurisdiction, the Commission cannot thereafter ignore that service in acting on broadcast applications.

Moreover, as H & B has shown in its Brief, the Commission itself has recognized a potential for CATV to provide vastly expanded communications services far beyond the ability of translators to

provide.^{9/} In its Brief, the Commission argues that H & B was relying not on Commission findings about the potential of CATV, but on a description of its long range potential seen by CATV advocates.^{10/} Nevertheless, in its Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397, 15 FCC 2d 417 (1968), the Commission instituted a formal inquiry on the potential for these services and the need for appropriate regulatory action. The Commission further states in its Brief^{11/} that there is no suggestion in the record below that the commencement of these services is imminent in Prescott. But in at least one respect--the origination of programming by CATV systems--the Commission is itself proposing to require CATV systems to provide program originations as a condition of their authority to carry television signals, and this does not appear to be a matter on which long delay will ensue. In ruling on requests for extension of time to file Comments in Docket 18397, the Commission granted only a limited extension of time on the question of mandatory CATV program origination because it believed that this was a matter of "immediate concern" which appeared "to require prompt rule making decisions by the Commission." See

^{9/} Brief for Appellant, pp. 33-37.

^{10/} Brief for Appellee, p. 16.

^{11/} Brief for Appellee, p. 16.

Memorandum Opinion and Order Extending Time for Filing

Comments in Docket 18397, 16 FCC 2d 645 (1969), at p. 646.

THE COMMISSION ERRED IN FAILING
TO CONSIDER THE AVAILABILITY OF UHF
CHANNELS FOR TRANSLATOR OPERATION AS
PART OF ITS WEIGHING PROCESS

It is undisputed that the Commission failed to consider the alternative of UHF operation for Booster's translator in its Memorandum Opinion and Order under review in this proceeding. While the Commission argues that this question was not raised directly by H & B until it sought a stay of the Commission's Order in this proceeding, that is not the case. The record below reveals that the availability of UHF channels for additional translator operation in Prescott has from the beginning been an important part of H & B's argument that Booster's application for authority to operate on Channel 2 should be denied or designated for hearing (A. 7-8, 29, 43-44).

Not until the Commission ruled on H & B's Motion for Stay did it address itself to the UHF argument. There, the Commission, based on unspecified information derived from its public files, determined that the costs of construction and operation of a UHF translator were higher than for a VHF translator and that UHF set saturation for the closest television market to Prescott (Phoenix) was about 59%, which is close to the national average (A. 74-75). The Commission

then stated (A. 75):

"Under the circumstances of this case, we did not believe it appropriate to suggest a UHF frequency as a reasonable alternative."

As H & B has previously shown,^{12/} however, Booster itself never raised the question of its ability to pay for a UHF translator, and H & B therefore never had an opportunity to address itself to this matter.^{13/} Moreover, as the record demonstrates, Booster is not reluctant to seek additional funds from its supporters when it has reason to make such a request (A. 51), and there is no reason^{14/} to believe that its appeals for additional funds are not successful.

^{12/} Appellant's Brief, pp. 29-30, F.n. 8.

^{13/} In its Motion for Stay filed with this Court on March 27, 1969, H & B submitted an Affidavit showing that it had advised Booster that it was willing to negotiate with it on the matter of H & B's either defraying or helping to defray the additional costs that would be incurred if Booster were to specify operation on a UHF channel. If Booster had raised the question of its ability to pay for operation on a UHF channel, a full factual record on this matter could have been developed before the Commission. In the absence of such a record, this Court should, if it agrees that the UHF alternative must be considered, remand this proceeding to the Commission for development of a full factual record.

^{14/} Booster's letter at A. 51 solicits contributions for the purchase of equipment to increase the power of Booster's existing translators. It is requested that the Court take official notice of the fact that on March 27, 1969, the Commission accepted for filing an application for increase in power for Booster's Channel 6 translator. See Public Notice of March 27, 1969 (Broadcast Applications Accepted and Tendered for Filing, No. 8522).

These considerations indicate that in any event the matter of Booster's ability to pay the costs of a UHF translator, if that factor is deemed relevant by the Commission, should have been resolved in a hearing.

The balance of the Commission's argument on the UHF alternative available to Booster is set forth in one paragraph at p. 20 of the Commission's Brief. That argument concedes that in other translator cases the Commission has considered the UHF alternative, points out that those cases turned on the impact grant of a VHF translator would have on the ability of a UHF station to develop and compete successfully, notes that here there is no UHF station in Prescott, and concludes that only by means of Booster's translators can some residents of the Prescott area receive free, off-the-air the signal of the Phoenix educational station. There is no discussion of why UHF television stations, which will receive no interference from VHF translators, are entitled to protection against competition from a VHF translator while a CATV system is not entitled to any consideration of its claim that operation of a translator on a VHF channel will, because of interference, impair the quality of the television reception the CATV system is able to offer to its subscribers.

In view of the Commission's policy of encouraging the use of UHF and the costs that have been imposed upon the public in support of this policy,^{15/} some further explanation of the Commission's failure to consider the UHF alternative is necessary.

CONCLUSION

In summary, it is H & B's position that the following facts raise serious questions, sufficient to require a hearing, about whether grant of Booster's application for a construction permit for a new VHF translator on output Channel 2 in Prescott would serve the public interest convenience and necessity:

1. Substantial amounts of VHF television service are already available off-the-air in Prescott from four translators presently licensed to Booster.
2. Operation of these translators already causes substantial amounts of interference to television reception by H & B's CATV subscribers in Prescott.

^{15/} See Brief for Appellant, pp. 25-29.

3. Operation of the translator at issue in this proceeding will increase the interference presently received by CATV subscribers in Prescott.

4. Operation of Booster's translator on a UHF channel would not increase this interference and will enable Booster to provide the same service to the residents of Prescott that is proposed in its application here at issue.

While the Commission made a "general observation" that methods were available to H & B to cope with translator caused interference, the Commission concedes that these statements were merely "hortatory." They therefore are not sufficient to resolve the showing made by H & B that the interference could not be eliminated. Similarly, the Commission's determination that Booster could not afford the cost of constructing and operating a UHF translator is based on extra-record considerations and relies on an argument not raised by Booster. Accordingly, H & B never had an opportunity to meet this issue before the Commission, and even if the Commission is correct in determining that Booster could not afford to construct and operate a UHF translator, that does not necessarily mean that Booster's application for a

VHF translator must be granted. Serious questions of impairment of television service to CATV subscribers still remain to be meaningfully weighed by the Commission.

For the foregoing reasons and the reasons set forth in its Brief, H & B urges that this Court remand this proceeding to the Commission with instructions that Booster's application be designated for hearing to determine whether the grant thereof will serve the public interest, convenience and necessity.

Respectfully submitted,

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